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APPELLATE COURT OF ILLINOIS

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JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court Second District

Appeal from the
Circuit Court of
La Salle County.

VS.

Defendant-Appellee.

FOVALDI -- J.

This is an action in garnishment against defendant in which Gerald E. Virgo is the nominal plaintiff and Maxine Dockus, executor of the Will of William H. Young, deceased, is the beneficial plaintiff. The action stems from a prior suit in the Circuit Court of LaSalle County in which Maxine Dockus, executor of the Will of William H. Young, deceased, brought a wrongful death action against Virgo as a result of a fatal automobile accident in which Young was killed

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WASHINGTON, D.C.

when the car he was driving collided with a car owned by Ladislaus Marella, the stepfather of Virgo, which was being driven by Virgo. The garnishee defendant, who was the liability insurance carrier on the automobile belonging to Ladislaus Marella, refused to furnish a defense for the defendant Virgo in the wrongful death action on the grounds that he was not using the car at the time of the accident with the owner's permission, either express or implied, and for that reason was not an "additional insured" under the terms of the policy.

The wrongful death action was not vigorously contested. The trial commenced at 10:00 A. M. and was concluded at 2:00 P.M. of the same day. No witnesses were offered on behalf of the defendant, and there was no cross-examination of the plaintiff's witnesses. The jury returned a verdict of \$15,000 for the wrongful death, and \$1,000 for the loss of the automobile belonging to the decedent, resulting in judgment against Virgo in the amount of \$16,000. Present garnishment proceedings were then commenced and affidavit in garnishment and interrogatories in the usual form were filed. The defendant filed its answer, attaching thereto a copy of the insurance policy in question; in which answer the garnishee denied that it had in its possession, custody, or charge, any money, credits or effects of Virgo, and stated that it was not at the time of service of process upon it, or at the time of filing its answer, in any manner, indebted to

Virgo. It admitted the issuance of a policy covering the automobile of Ladislaus Marella, and alleged that it was not liable to pay under said policy for the reason that Virgo was not driving the automobile involved with the permission of Ladislaus Marella and, therefore, said policy, at the time and place, did not provide any coverage thereunder to Virgo. The trial court found for the defendant herein and dismissed the garnishee, and plaintiff's in the garnishment proceeding then filed this appeal.

About 10:30 on the morning of February 1, 1953, an accident was reported to the representative of the State Farm Mutual Automobile Insurance Company, who shortly thereafter, assigned an investigator in the matter. The investigator, Richard Calkins, an attorney at law, found that Gerald E. Virgo, 22, had returned to his stepfather's house, where he resided, procured the garage door lock key and the automobile keys after his stepfather and mother had returned home and had gone to bed and were asleep. Without his stepfather's or mother's knowledge or permission, Virgo had unlocked the garage doors and taken the stepfather's automobile, about 4:30 or 5:00 A.M., and while alone in the car, had a fatal accident with Young, who likewise was alone in his automobile. Calkins, during his investigation, which was made on the day of the accident, took statements from Ladislaus Marella, the stepfather, Sally Marella, the mother of Virgo, and Gerald E. Virgo himself. These statements were taken before Irene Reddington, a shorthand reporter.

Much of the questioning contained in these statements had to do with whether or not the use of the automobile was non-permissive or not. The answers contained in those statements indicated that Virgo was using the car without the permission of Ladislaus Marella. Subsequently, when the common law wrongful death action was commenced by Maxine Dockus, executor of the Will of William H. Young, deceased, against Virgo in the Circuit Court of LaSalle County, Illinois, the State Farm Mutual Automobile Insurance Company, the defendant garnishee in this proceeding, refused to furnish a defense of the case for Virgo by reason of the alleged non-permissive use by him of its insured's automobile. The insurance company gave Notice of Non-Waiver of Rights to deny liability under the policy, and, likewise, a Non-Waiver of the rights of Gerald E. Virgo under the policy, which Non-Waiver was signed by Virgo and by Calkins, the attorney for the defendant.

Upon the trial in the garnishment proceedings, the witnesses for the plaintiff, who, in the main part, consisted of Virgo, his step-father and his mother, testified that Virgo had permission to use the car at the time of the accident. This was in direct conflict with the statements which were made to Calkins the day of the accident, and counsel for the defendant used the statements taken by Calkins to impeach the testimony of plaintiff's witnesses. It would unduly lengthen this opinion to detail the differences in the statements given to Calkins by the witnesses immediately after the accident, and

in their testimony given in the trial court. Suffice it to say that the mother, on thirty occasions, answered to impeaching questions that she either did not know or didn't remember, or could not say whether she had given conflicting answers to questions asked her by Calkins. The stepfather made twenty-two such answers, and the son thirty-two. It is obvious from a careful reading of the record in the case that the story told by these principal witnesses on the day the death occurred and the testimony given by them on the witness stand were substantially in conflict.

The fundamental issue involved in this appeal is whether or not Virgo had permission, express or implied, to use the automobile at the time of the accident. Plaintiff had the burden of proof throughout the trial to prove a permissive use by a preponderance of the evidence. The Supreme Court, in the case of Soukup v. Halmel, 357 Ill. 576, at 579, stated:

"The proof of such permission lies at the foundation of plaintiff's right to recover under the policy. Unless and until that fact was proven there was no duty on the part of defendant to establish any defense under the policy. The burden of proof rested upon plaintiff to establish that Anton (the tort feisor) was covered by the policy. That burden was not shifted by the affirmative allegation in the answer that he was not covered. The denial raised the issue as to whether he was covered, and not whether a liability existed under the policy because of an alleged breach."

The instant case was tried before the court without a jury. In referring to the mother, the son and the stepfather, the trial court said in his statement of his reasons for his decision:

1. The first part of the paper is devoted to a general
discussion of the problem of the existence of
a solution of the system of equations
which are satisfied by the functions u_i and v_i .

2. In the second part we consider the case when
the functions u_i and v_i are assumed to be
continuous and differentiable in the domain D .
In this case the system of equations can be
written in the form

$$\begin{aligned} & \Delta u_i + \sum_{j=1}^n a_{ij} u_j = f_i(x) \\ & \Delta v_i + \sum_{j=1}^n b_{ij} v_j = g_i(x) \end{aligned}$$

"Now certainly the story that these principals told the day this death occurred and the story they told from the witness stand in this case are absolutely in conflict. They were either truthful the day the accident happened or they were untruthful. They were either truthful on the witness stand or they were untruthful. ****

"I have been unable to convince myself, in view of these directly opposing statements made by the principal witnesses that testified before the court and their statements made the day after the accident. As I say, I have been unable to convince myself that the plaintiff has proved his case by a preponderance of the evidence. ****"

The question of fact was one for the court who was hearing the case and passing upon it. Where the evidence is in sharp conflict, it is within the province of the trial court to pass upon its weight and probative value, Keefer Coal Co. v. United Electric Coal Cos., 291 Ill. App. 477, at 492. The findings of the trial court are entitled to the same weight as a verdict of a jury and we would not be at liberty to set the same aside unless we found same to be manifestly against the weight of the evidence. Jones v. Manufacturer's Cas. Ins. Co., 313 Ill. App. 386, at 391.

After a careful examination of the record, we cannot say that the findings of the trial judge in this matter are manifestly against the weight of the evidence. They are in harmony with the evidence and are amply supported thereby.

ove, R. J. Concur

F. E. Crow
Concur.

Judgment affirmed.

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46999)
47000) Consolidated

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12 I.A.^{2d} 93

EDWARD ALETTO,

Appellee,

v.

EVE KYATT and HENRY KYATT, et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

The consolidated causes present for review decrees of strict foreclosure entered by the Circuit Court.

Defendant Henry Kyatt appeared by counsel in most of the hearings had before the master and in a hearing before the chancellor, but when the decrees were finally presented and entered, he chose to proceed without counsel and prosecuted pro se an appeal in each of the causes to the Supreme Court. Because no freehold was involved, the causes were transferred by the Supreme Court to this court, and defendant Kyatt has prosecuted pro se the appeal in this court. We mention this because, were we to enforce the rule governing the filing of briefs and abstracts, as requested by plaintiff, we would affirm the judgment for failure of the abstract and briefs to present properly the errors relied upon. Department of Finance v. Bode, 376 Ill. 374; Clinton v. Drainage Commissioners, 341 Ill. 135. As was said in Biggs v. Spader, 411 Ill. 42, 46:

"Appellant has, of course, a right to appear pro se, but when he does so he must comply with the established rules of procedure." The appeal is dismissed.

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Under the particular circumstances in the instant case, notwithstanding the absence of a proper abstract, we have examined the record to determine if there is any merit in the present appeals.

The only material question we discern from the inadequate briefs of the defendants is, whether the court in each of the causes was justified in entering a decree of strict foreclosure.

In an unbroken line of authorities, as early as Johnson v. Donnell, 15 Ill. 97, down to Ellis v. Leek, 127 Ill. 60; Carpenter v. Plagge, 192 Ill. 82; and Pruett v. Midkiff, 273 Ill. App. 142, 144; it was held that equity had the power to decree strict foreclosure where it affirmatively appears that the mortgagor or owner of the equity of redemption is insolvent, and the value of the property is less than the mortgage indebtedness and taxes, and the mortgagee accepts the property in extinction of the mortgage indebtedness. It was further declared in those cases that the Redemption statute, fixing the period of redemption for the mortgagor, does not bar the right to a decree of strict foreclosure under such circumstances. Johnson v. Donnell, supra.

The record before us clearly establishes that the value of the properties involved was insufficient security, and less than the mortgage indebtedness and taxes, and that the owners of the equity of redemption were insolvent. The decrees, which gave the defendants 90 days in which to pay the amount found due, and that upon failure to pay the same the mortgagee would be deemed to have absolute title to the

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real estate in extinction of the mortgage indebtedness, were fully justified.

We find no error in the record, and the decrees in each of the consolidated causes are affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

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RUTH MAGID,

Appellant,

v.

NOAH MULSTEIN,

Appellee.

12 I.A. 2d 93
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a finding and judgment for defendant. Originally there was a judgment for plaintiff entered by confession, in the sum of \$692.50, claimed as the unpaid balance on a note dated January 31, 1952. The judgment included \$92.50 attorney's fees. Defendant's petition to vacate the judgment and to allow defendant to plead was sustained, and defendant was ordered to file an answer. The answer set up the defense of payment in full.

The record discloses that plaintiff and her husband entered into an agreement with defendant for the sale of one-half of the capital stock of Calumet Drugs, Inc., for the sum of \$7500, to evidence the payment of which, defendant executed his note in said amount, payable to plaintiff in weekly installments, as therein provided. The agreement, among other things, contained certain stock restrictions until the full amount was paid. It also provided that the parties would cause Richard Magid to be president; Ruth Magid, vice president; and defendant, secretary, treasurer and director of said corporation. The agreement fixed the salary to be paid to the defendant for his services to the corpora-

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tion, and provided that in addition to the installment payments in said note, there was to be applied as a credit 50% of any dividends, bonuses or extra compensation which defendant may receive from said corporation.

Differences arose between Richard Magid and the defendant, and a dispute developed as to the salary of the respective parties. To adjust their differences and remove certain restrictions with respect to the sale of stock in said corporation, another agreement was entered into, dated January 31, 1952, which referred to the earlier agreement, and recited that there was a balance of indebtedness due to plaintiff in the sum of \$5200, for which amount defendant was to execute a note payable in weekly installments. It appears that the agreement was drafted in December, 1951, but was not dated until January 31, 1952, and the interim payments made by defendant were to be credited on the balance owing upon the original note. A new note, dated January 31, 1952, was executed in the sum of \$4950. Plaintiff claims that defendant owed \$600 as the balance due upon the new note, after allowing all credits and payments.

Many checks evidencing payments and certain correspondence were received in evidence. There is a sharp conflict in the testimony. If the evidence for the defendant is to be believed, it would establish that he paid the note in full, and that the recital of the balance due in the agreement executed January 31, 1952, was clearly a mistake. The rights of third parties are not involved, and the burden of proving payment was upon the defendant.

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The second part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The third part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The fourth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The fifth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The sixth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The seventh part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The eighth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The ninth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The tenth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development.

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Since the second agreement made reference to the original agreement, reciting the balance due upon the original agreement and note executed pursuant thereto, it requires that the two instruments be considered together as a part of the one transaction (Dillow v. Hileman, 300 Ill. App. 509; McAndrews & Forbes Co. v. Mechanical Mfg. Co., 367 Ill. 288), and performance shown under the original agreement, as well as the second, is competent.

The conflict in the testimony centers around certain credits claimed by defendant. The trial judge having seen and heard the witnesses, and being in a better position to judge their credibility, his finding should not be disturbed unless we can say that it is against the manifest weight of the evidence. We think the record amply supports the finding and judgment.

The judgment is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

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IN THE MATTER OF THE ESTATE OF
EZEKIEL J. MORRIS.

TANAQUIL KIMBROUGH SIMMONS,
Appellant,

v.

HARRIET ALBERTA MORRIS and BOOKER
TALIAFERRO MORRIS, Executors,

Appellees.

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12 I.A.^{2d} 94

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE LEWE DELIVERED THE OPINION OF THE COURT.

Tanaquil Kimbrough Simmons filed her original and amended claims in the sum of \$6,500.00 for services rendered against the Estate of Ezekiel J. Morris, deceased, in the Probate Court of Cook County. After a trial, her claims were disallowed. Claimant appealed to the circuit court where her claims were consolidated and again disallowed, whereupon the claimant appealed to this court.

The amended claim reads:

"Claim for services in the amount of \$6500.00 which were rendered continuously from January 1, 1933, to and including June 30, 1935, at the rate of \$50.00 per week for services rendered to Rev. Father E. J. Morris, as his secretary-bookkeeper and helper in his home and church, located at 3924 and 3926 South Parkway, Chicago, Illinois. That he subsequently promised and agreed to pay in May 5, 1948, August 4, 1953, and April 11, 1954.

"The aforesaid claim is evidenced by one promissory note in the amount of \$6500.00 from the 5th day of May, 1948. Interest thereon at the rate of six per cent per annum. The interest and principal totals \$8635.00. A copy of said note is hereto attached and made a part hereof, as claimant's Exhibit 1.

[signed] Tanaquil Kimbrough Simmons

"\$6500.00

Ninety days after date for value received I promise to pay to the order of Tanaquil Kimbrough, Six Thousand Five Hundred and no/100 dollars with interest at six (6) per cent per annum after date until paid.

[signed] Father E. J. Morris"

Three witnesses testified in behalf of claimant and four witnesses in behalf of the executors of the estate hereinafter called defendants. There was a sharp conflict in their testimony.

Claimant's evidence tends to prove that she worked continuously for the deceased, known to his followers as "Father Morris," from 1928 to 1938 and occasionally after 1938. She received no compensation from January 1, 1933, to June 30, 1935, though her alleged salary was to have been \$50.00 weekly. In 1932, 1933, and 1934, at Christmas Eve dinners, the deceased announced to his employees that he was at that time unable to recompense them for their services. He asked them to continue to work for him. Claimant among others agreed to do so.

Claimant introduced in evidence two documents. The first was the promissory note for \$6,500.00, dated May 5, 1948, shown in the amended claim. Claimant's brother testified that at the time the note was given to claimant by decedent, he said to claimant in the presence of her brother, "I have a paper I want to give you in the event anything happens to me you can collect the salary I owe you."

The second document was a letter from the decedent addressed to claimant dated April 11, 1954, which reads:

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"Dear T,

This is to again acknowledge that there is due and owing from, the Father E. J. Morris, to you \$6500.00 for faithful services rendered to me as my secretary and bookkeeper all during the years of 1933, 1934, and 1935. The services were rendered at the rate of \$50.00 per week, and I was not able to pay you at that time, or since.

Sincerely,

[signed] Rev. Father E. J. Morris"

With respect to this letter, claimant's brother testified that he was called on the telephone at his home by decedent on April 11, 1954; that decedent stated to the witness that the claimant was present at his residence and that he was giving claimant a letter "so she can collect the salary I owe her."

Defendants' theory of their case is that the claimant was never employed by the decedent upon a salary basis and that she rendered gratuitous services for the church and decedent as its spiritual leader.

All of defendants' witnesses testified in substance that they worked for the decedent without a salary according to the dictates of their religious beliefs; that decedent would from time to time give them gifts of money; and that some received room and board.

Defendants introduced 37 printed combined receipts and releases. These exhibits, signed by plaintiff, were for varying amounts ranging from \$2.00 to \$49.00, and extending from June 1, 1936, to December 31, 1937. They read as follows:

" [Date]
Received of Father E. J. Morris the Sum of [amount recited]
Dollars in full of all money due me. It having been expressly
and definitely agreed and understood between Father E. J.
Morris and myself that I am not employed upon any salary at



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all, and that all back money has been paid in full, and no further money is to accrue by reason of any services rendered by me.

* * *

[signed] Mrs. T. Z. Kimbrough"

James B. Morris testified on behalf of defendants that he was employed as a private secretary and did general maintenance work around decedent's premises from 1937 to the latter's death on April 24, 1954; that after April 1, 1954, the decedent "could hardly get around"; that "he was short of breath"; that the witness, who occupied a room two doors from decedent, saw him every day in April until he died and that during this period decedent "talked to one or two people."

James Morris further testified that as secretary he took care of all the decedent's correspondence, the records of the church and all the communications of the members of the church; and that he did not type the letter of April 11, 1954, addressed to claimant.

The trial judge in the circuit court disallowed the claims on the ground that there was no valid consideration for the promissory note.

Claimant's main contentions are that where a negotiable promissory note is given, the consideration thereon is presumed and that the burden is on the defendant to prove a lack of consideration.

Claimant admits that after rendering the alleged services upon which she bases her claim, claimant executed the receipt-releases introduced in evidence to decedent in return for payment of money.

The first part of the report
 describes the general situation
 of the country and the
 progress of the work
 during the year.
 The second part
 contains the results of the
 investigations and the
 conclusions drawn from them.
 The third part
 contains the financial statement
 and the balance sheet.
 The fourth part
 contains the annual report
 of the directors and the
 annual report of the
 shareholders.

A written receipt, if properly identified, is prima facie evidence of the truth of the recitals it contains. (The People v. Davis, 269 Ill. 256.) Here the record shows that each receipt was introduced and claimant's signature was identified as being authentic. We think this testimony was sufficient to establish the authenticity of claimant's signature and that the receipt-releases were competent.

The law is well established that claims against the estates of deceased persons must be scrutinized with care. (In re Estate of Busse, 332 Ill. App. 258; Floyd v. Estate of Smith, 320 Ill. App. 171; Roberts v. Roberts, 175 Ill. App. 109.) In order to establish a claim for services to decedent during his lifetime, claimant must show either an express contract or an implied agreement or mutual understanding that the services were to be paid for by clear and convincing evidence. Particularly strong and convincing proof is required where the claim is stale. (19 Ill. Law and Practice §187, pages 160-61.)

In the present case, claimant presented her claim against the estate of decedent more than 20 years after the alleged services were rendered. The uncontroverted evidence also shows that the \$6,500.00 note upon which claimant bases her claim for services was executed about 13 years after she rendered the services. Six years more elapsed between the execution of the note and the signing of the letter of April 11, 1954, in which decedent acknowledged his alleged indebtedness to claimant. April 24, thirteen days after signing this letter, decedent died.

The first thing I noticed when I stepped
out of the car was the cold air. It was a
sharp contrast to the warm blanket I had been
under. I looked up at the sky, which was a
pale blue, and felt a sense of peace. The
world seemed so quiet, so still. I took a
deep breath and felt the air fill my lungs.
It was a good feeling. I had been so
tired, so stressed. But now, here I was,
in the middle of nowhere. It was a strange
feeling, but I liked it. I had found a
place where I could be alone, where I could
be myself. I had found a place where I
could be free. I had found a place where
I could be happy. I had found a place
where I could be me.

A comparison of the signatures of the decedent on the \$6,500.00 note, alleged to have been executed in 1948, and the letter of April 11, alleged to have been signed in 1954, shows that each document is written in the same firm, steady hand. Although it is undisputed that on April 11th decedent was gravely ill, there appears to be no difference in the decedent's handwriting on these two documents.

We agree with defendants' contention that the basic issue in this case is one of fact. Claimant does not urge that the trial court's finding is against the manifest weight of the evidence. In our opinion the evidence is ample to support the finding that the note in controversy is invalid for lack of consideration.

In the view we take of this case, it is unnecessary to discuss the other points raised. For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND KILEY, J. CONCUR.

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THERESA MALCZYK,)	APPEAL FROM
)	
Appellant,)	
)	CIRCUIT COURT,
v.)	
)	
EDWARD MALCZYK,)	COOK COUNTY.
)	
Appellee.)	

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce proceeding and the only question on appeal concerns custody of children. The divorce decree was in favor of the plaintiff. The Chancellor awarded custody of two children to plaintiff and of one child to the defendant. Plaintiff has appealed from this part of the decree and the question is whether the Chancellor abused his discretion in making the award.

The parties were married in Illinois in 1948 and soon thereafter moved to California. After three children, boys, were born the parties separated in 1954 under an agreement providing, among other things, that plaintiff should have custody of the children. Plaintiff filed suit for divorce in California but before service was had on defendant he took the children from California to Illinois "for a vacation." Plaintiff came to Illinois and filed a habeas corpus proceeding which in May, 1954, resulted in an award to her of the two younger children, then aged one and two-and-a-half, and to defendant of the oldest child, then aged five.

In May, 1955, plaintiff sued for divorce and in June the decree was entered. At the close of the testimony

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on the divorce and custody hearing the Chancellor, who had also conducted the earlier habeas corpus proceedings, made two significant statements. He said that the children should not be separated and should be together in one place, but neither party had "accommodations for that kind of situation" and that "you will have to work it out yourselves." The reference to inadequate accommodations was to housing: plaintiff has one bedroom in an apartment wherein the other bedrooms are occupied by another couple and small girl; defendant lives with his mother and sister.

We think the Chancellor did not abuse his discretion in awarding the children as he did. He found both parties fit persons and fitness is admitted in the briefs. Plaintiff was seeking custody of the three children but did not show on the hearing that she could properly accommodate them if given custody of them. The Chancellor recognized these unfortunate children ought to be together, but was justified, for their best interests, in leaving them as they were as a lesser evil than the alternative facing him. No cases sustaining a mother's right to children of tender ages have been cited with facts such as those which faced the Chancellor in the instant case.

For the reasons given, the decree is affirmed.

AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

1. The first part of the report is a general
 introduction to the subject of the study.
 2. The second part is a description of the
 methods used in the study.
 3. The third part is a description of the
 results of the study.
 4. The fourth part is a discussion of the
 results of the study.
 5. The fifth part is a conclusion of the
 study.
 6. The sixth part is a list of references.
 7. The seventh part is a list of figures.
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 47. The forty-seventh part is a list of practices.
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 49. The forty-ninth part is a list of behaviors.
 50. The fiftieth part is a list of actions.

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Abstract A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A. D. 1956. 12 I.A.^{2d} 96

General No. 10106

Agenda No. 15

Board of Education of Roodhouse
Community High School District
No. 108, Glen Seely, Norman Page,
and LeRoy Hookins,

Plaintiffs.

Board of Education of Roodhouse
Community High School District
No. 108,

Plaintiff-Appellant,

vs.

County Board of School Trustees,
Greene County, Illinois; Board of
Education of Carrollton Community
Unit District No. 1; Board of
Education of Patterson Community
Consolidated District No. 110;
Board of Education of Pittsfield
Community Unit District No. 2; Board
of Education of Winchester Community
Unit District No. 1; Board of
Education of White Hall Community
Unit District No. 2; and Board of
Education of Hillview Community
Consolidated District No. 111,

Defendants-Appellees.

Appeal from
Circuit Court of
Greene County.

Answer

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REYNOLDS, R. J.

This is an appeal from the Circuit Court of Greene County affirming an order of the County Board of School Trustees of Greene County, Illinois. The proceeding was brought under the provisions of the Administrative Review Act, in accordance with Section 4B-25 of the School Code (Ill. Rev. Stat. 1955) Chapter 122, paragraph 4B-25. The order of the County Board of School Trustees, Greene County, Illinois, provided for the annexation of certain non-high school territory of Greene County, Illinois to White Hall Community Unit District No. 2. The area involved is located in the northwestern corner of Greene County. The Illinois River bounds it on the west; adjoining it on the north is Winchester Community District No. 1; adjoining on the south is Carrollton Community District No. 1; adjoining on the east for slightly over one-third of the boundary at the northern end of the territory is Roodhouse Community High School District No. 108; the remaining portion of the eastern boundary adjoins the White Hall Community Unit District No. 2. The underlying elementary district is the Hillview Community Consolidated District No. 111. The area is rural except for the town of Hillview, located in the central eastern portion of the territory. The territory is connected with Roodhouse and White Hall by good all-weather roads, it being approximately seven and one-half

This is an appeal from the Circuit Court of Greene

County affirming an order of the County Board of Trustees

of Greene County, Illinois. The County Board was

brought under the provisions of the Illinois School Code

act, in accordance with Section 1-25 of the School Code

(Ill. Rev. Stat. 1925) Chapter 122, Sections 1-25, 1-26

order of the County Board of Trustees, Illinois, to

Illinois, provided for the formation of township

school districts of Greene County, Illinois, and

Community Unit District No. 2. The Board of Trustees

in the northwestern corner of Greene County, Illinois

their bounds is on the west by the Township of

Lincoln Community District No. 1, Illinois, and on

is Garfield Community District No. 1, Illinois, and on

east by the Township of Greene County, Illinois, and on

north by the Township of Greene County, Illinois, and on

School District No. 1, Illinois, and on the south by

section boundary between the Township of Greene County,

District No. 2. The northwestern corner of the

Illinois Community District No. 1, Illinois, and on

area is truly exact for the Township of Greene County,

the eastern corner portion of the Township. The

is connected with the Township of Greene County, Illinois,

western road, is being improved and is being

miles from the town of Hillview to White Hall, and approximately eleven miles to Roodhouse. The area involved became subject to annexation under the provisions of Section 11-18.1 of Chapter 122 (Ill. Rev. Stat. 1955). That section of the School Code provides as follows:-

"If all the territory of the non-high school district of any county having a population of 500,000 or less has not been annexed to some high school district maintaining grades nine to twelve, each inclusive, by June 30, 1953, it shall be automatically eliminated from the non-high school district on August 1, 1953, unless the county board of school trustees and the Superintendent of Public Instruction jointly find and certify on or before July 31, 1953, and on or before June 30 of each year thereafter that (1) the non-high school territory is adjacent to a district created by a special act whose boundaries are required by such act to be coterminous with some city or village or to a district maintaining grades one to twelve, each inclusive, and (2) has children in such territory who customarily attend the high school of such district and (3) has no school district operating grades nine to twelve, each, inclusive, to which such territory could be annexed without impairing the educational opportunities of the children of such territory and in such case the territory shall remain non-high school territory. However, any non-high school territory that the county board of school trustees

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and the Superintendent of Public Instruction jointly find and certify on or before June 30, 1954, is adjacent to a district maintaining grades one to twelve, each inclusive, and has less than sixty high school pupils in average daily attendance during the school year 1953-1954, in public schools for whom tuition is paid, shall be automatically eliminated from the non-high school district on July 1, 1954, and any non-high school territory that the county board of school trustees and the Superintendent of Public Instruction jointly find and certify on or before June 30, 1954, is adjacent to a district maintaining grades one to twelve, each inclusive, and has sixty or more high school pupils in average daily attendance during the school year 1953-1954, in public schools for whom tuition is paid, shall automatically be eliminated from the non-high school district on July 1, 1956, provided that in counties having a population of 500,000 or more the non-high school territory shall be eliminated on July 1, 1958."

Where such a non-high school district is eliminated under the provisions of the above quoted section, the law as set forth in Section 4B-25 of Chapter 122 (Ill. Rev. Stat. 1955) provides in part as follows:-

"When any territory is eliminated from a non-high school district by the provisions of Section 11-18.1 of The School Code, the county board of school trustees of the county in which such territory lies shall within thirty days after such date hold one or more public hearings with respect to

the attachment of such territory to one or more districts maintaining grades nine to twelve, each inclusive.

"Notice of such hearing shall be given in writing by the county board of school trustees to each elementary school board in the territory to be considered at the hearing and to each school board of any district adjoining such territory maintaining grades nine to twelve, each inclusive. The notice shall be published once at least ten days before such hearing in a newspaper of general circulation in the territory and of general circulation in the districts adjoining such territory maintaining grades nine to twelve, each inclusive. The notice shall describe the territory to be annexed and shall give the time and place of the hearing.

"The county board of school trustees shall hold a hearing and annex the territory to the district that they determine will best serve the interests of the pupils in the area and will best serve the educational welfare of the pupils in the area and to which the pupils of the underlying elementary school district normally attend high school, where possible. The order annexing the territory shall be issued not more than ten days after the hearing and shall be effective immediately unless the order provides for the attachment of the eliminated non-high school territory to a district in an adjacent county or to a district whose school board is elected and has been given the powers of school

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trustees in which case a copy thereof, certified by the secretary of the county board of school trustees making such annexation, shall be given to the county board of school trustees in the adjacent county or to the school board in the district whose board is elected and has been given the powers of school trustee. Upon receipt of such order the county board of school trustees or school board, as the case may be, shall give ten days notice of the hearing once in a newspaper of general circulation in the district and shall give a notice in writing by registered mail at least 10 days prior to the hearing to each school board which was given notice of the hearing conducted by the county board of school trustees of the county in which the territory is located. The notice shall describe the territory to be annexed and give the time and place of the hearing. The board conducting the hearing shall make its determination based upon the same factors as the county board of school trustees wherein the territory is located is required to consider and shall issue an order not more than ten days after such hearing either approving or rejecting the original order. The order rejecting or approving the annexation shall be effective immediately.

"If the former non-high school territory is annexed to a district maintaining grades one to twelve, each inclusive, the elementary district, or parts thereof, underlying the territory which is annexed shall automatically be detached from such elementary district and become a part of the district to which the territory is annexed."

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SECRET

On July 27th, 1955, the County Board of School Trustees of Greene County, ordered all the non-high school territory involved in this appeal attached to White Hall Community Unit District No. 2. This order by means of the Administrative Review Act, was reviewed by the Circuit Court of Greene County and the order affirmed. From the decision of the Circuit Court, the appellants filed their appeal to the Supreme Court of the State of Illinois, contending that Section 4B-25 of the School Code was unconstitutional. The Supreme Court ruled that the case was wrongfully appealed to that court and transferred it to the Third District Appellate Court. It will therefore not be necessary to consider the constitutionality of this section.

The only other contention made on the appeal is that the County Board of School Trustees and the affirming order of the Circuit Court of Greene County, are against the manifest weight of the evidence. This court has the power to set aside the findings and order of the administrative agency, on the ground that the findings and order are against the manifest weight of the evidence. However, the Administrative Review Act itself provides that the findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct. Ill. Revised Statutes, 1953, 1955, Chapter 110, par. 274.

Apparently, the facilities of the two schools are

On July 27th, 1955, the County Board of School Trustees of Greene County, ordered all the non-high school territory involved in this appeal attached to White Hall Community Unit District No. 2. This order by name of the Administrative Review Act, was reviewed by the Circuit Court of Greene County and the order affirmed. From the decision of the Circuit Court, the appellants filed their appeal to the Supreme Court of the State of Illinois, contending that section 15-1.5 of the School Code was unconstitutional. The Supreme Court ruled that the case was wrongfully appealed to that court and transferred it to the Third District Appellate Court. It will therefore not be necessary to consider the constitutionality of this section.

The only other contention made in this appeal is that the County Board of School Trustees had no authority to order the Circuit Court of Greene County, the Appellate Court, the weight of the evidence. This court has the duty to give the findings and order of the Administrative Review Act, on the ground that the findings and order are against the weight of the evidence. However, the Administrative Review Act itself provides that the findings and order of the Administrative Review Act are on question of fact and are prima facie true and correct. Ill. Revised Statutes, 1955. Chapter III, Art. 15.

Apparently, the facilities of the two schools are

substantially equal. White Hall does not have a school lunch program but expects to put one in in the near future. Roodhouse does have a school lunch program. The taxes that would be imposed upon the residents of the territory involved by either school, are substantially the same. The teaching staff, and the educational facilities offered are relatively the same. But, although the Roodhouse School is some four miles farther away, most of the landowners and residents of the area involved seem to prefer the Roodhouse School. An examination of their testimony discloses that many of them feel that by annexation to the Roodhouse School the elementary school authorities would be permitted to retain control of the elementary school and its operation. If the annexation is made to a unit school district, that is, a district maintaining grades from one to twelve, both inclusive, then the elementary school does become merged in that of the unit school. On the other hand, if the annexation is made to a high school district, that is, a school maintaining grades from nine to twelve, both inclusive, then, in such case, the elementary school remains the same and control remains in the local school authorities. However, this is not one of the rules or regulations by which the County Board of School Trustees is governed in determining to which district the area should be annexed. The rules laid down by Section 4B-25 of the School Code are that the County Board of School Trustees shall hold a hearing and annex the territory to the district that they determine will best serve the interest of the pupils of the area and will best serve the

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educational welfare of the pupils of the area and to which the pupils of the underlying elementary district normally continue high school, where possible. Thus, it is readily seen and perfectly understandable that while people of Hillview School District No. 111 desire to retain local control of their elementary school, yet, that is not one of the things that can be or should be considered by the County Board of School Trustees in determining to which school district the non-high school territory should be annexed. The legislature has set forth the basis upon which the County Board of School Trustees may make a determination, and those rules require that the County Board of School Trustees annex the territory to the district that they determine will best serve the interest of the pupils in the area and will best serve the educational welfare of the pupils in the area and to which the pupils of the underlying elementary district normally continue high school, where possible. Thus, it will be seen that the three yardsticks upon which the County Board of School Trustees may determine the annexation are: (1) what will best serve the interest of the pupils in the area; (2) what will best serve the educational welfare of the pupils in the area, and (3) the district where the pupils of the underlying elementary school district attend high school, if possible. These and these only are the rules by which the County Board of School Trustees may act in determining annexation, and the desire to retain control of the elementary

educational welfare of the pupils of the area and to which
the pupils of the underlying elementary district normally
continue high school, where possible. Thus, it is readily
seen and perfectly understandable that while pupils of this
view School District No. 111 desire to remain in the district
of their elementary school, yet, that is not the only thing
that can be or should be considered by the County Board of
School Trustees in determining to which school district the
non-high school territory should be assigned. The trustees
has set forth the basis upon which the County Board of
Trustees may make a determination, and these things require
that the County Board of School Trustees should be permitted
to the district that they determine. With this in mind, it is
of the pupils in the area, and it is not the duty of the
welfare of the pupils in the area, and it is not the duty of
the underlying elementary district, and it is not the duty of
where possible, then, it will be seen that the trustees
upon which the County Board of School Trustees is permitted
to make a determination. (1) That the County Board of School
Trustees in the area, and it is not the duty of the
welfare of the pupils in the area, and it is not the duty of
the pupils of the underlying elementary district, and it is not
high school, if possible, then, it will be seen that the
by which the County Board of School Trustees is permitted
ing determined, and it is not the duty of the

school while entirely proper and understandable, yet, these desires should have no influence upon the County Board of School Trustees in their decision as to which District this School District should be annexed.

Upon full examination of all testimony in connection with the facilities, tax situation and other factors involved, this court is not disposed to hold that the decision and findings of the County Board of School Trustees was against the manifest weight of the evidence.

For the reasons stated, the findings and order of the County Board of School Trustees, Greene County, Illinois, as affirmed by the Circuit Court of Greene County, Illinois, are affirmed.

Affirmed.

school while entirely proper and understandable, yet, these desires should have no influence upon the Court. Board of School Trustees in their decision as to which District this School District should be annexed. Upon full examination of all testimony in connection with the facilities, tax situation and other factors involved, this court is not disposed to hold that the decision and findings of the Court Board of School Trustees was against the manifest effect of the evidence. For the reasons stated, the Court in the order of the County Board of School Trustees, County, Illinois, as affirmed by the Circuit Court, County, Illinois, is affirmed.

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Abstract

General No. 10934

Agenda No. 17

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

12 I.A. 2d 226

May Term, A. D. 1956.

WARREN T. BERG and ESTHER WIEDRICH,
Administrator of the Estate of
HAROLD WIEDRICH, Deceased,

Plaintiffs-Appellants,

VB.

LEONARD HENRY,

Defendant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
BOONE COUNTY.

DOVE, P. J.

Warren T. Berg and Harold Wiedrich filed an action in replevin against the defendant, Leonard Henry, in the circuit court of Boone County to recover the possession of nineteen dairy cows which they alleged the defendant wrongfully took and detained from them. The defendant, by his answer, denied that the plaintiffs were entitled to possession of the cows and filed a counterclaim. By his counterclaim, he alleged that on or about September 25, 1952, counter-defendants, Berg and Wiedrich, (hereinafter referred to as the plaintiffs) wrongfully permitted certain of their hogs to escape from their lands and enter upon the lands of the counterclaimant (hereinafter referred to as the defendant) and that these

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study was funded and whether there were any conflicts of interest.

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hogs uprooted certain seeded waterways and certain pasture on the lands of the defendant and uprooted a large part of a cornfield located on his farm and knocked down a large portion of the standing corn in this field, all to his damage in the sum of \$750.00.

The counterclaim also alleged that on or about October 15, 1952, cattle owned by the plaintiffs broke through the line fence dividing his farm and the farm of the plaintiffs and entered upon defendant's lands; that the cattle broke through a line fence which the fence viewers had determined was the fence of plaintiff, Berg, and, ~~through a temporary fence which defendant maintained and that the cattle~~, after entering upon defendant's land, destroyed an acre and one-half of standing corn, for which he claimed damage in the amount of \$400.00. The defendant also claimed further damages in the sum of \$100.00 on account of plaintiffs' cattle breaking through a temporary fence which he had built. The defendant also alleged that he had lost the use of approximately three-fourths of an acre of his land for the past five years because of the necessity of maintaining the temporary fence on his own land upon the refusal of plaintiffs to build and maintain their share of the line fence separating their farms and for the loss of the use of this land, he claimed damages in the amount of \$150.00. He also alleged that the failure of plaintiffs to build and maintain their share of the line fence made it impossible for him to rotate crops on an 8-acre tract of his farm which lies adjacent to that portion of the line fence of plaintiffs which they failed to maintain and this caused him damages in the sum of \$500.00. By an amendment to

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his counterclaim, defendant alleged that from September 1 to September 14, 1953, cattle owned by the plaintiffs broke into his field and trampled eight acres of new seeding on his farm to his damage of \$150.00, and also trampled down and ate corn in a 12-acre field of his to his further damage of \$450.00. His total claim for damages amounted to \$2500.00. By their ~~answer~~^{reply} plaintiffs denied all of the material allegations of the counterclaim.

The plaintiffs made a motion to dismiss the counterclaim and the amendment to the counterclaim on the ground that a counterclaim is not permissible in an action of replevin. Their motion was denied. While the proceeding was pending, the plaintiff, Harold Wiedrich, died and, upon his death being suggested, his wife, Esther Wiedrich, as the administrator of his estate, was substituted as a party plaintiff and as counter-defendant to the counterclaim. A trial by jury was had upon the issues made by the complaint, answer, counterclaim and reply and at the close of ~~the hearing~~ the plaintiffs' ~~case~~^{case}, the jury, in obedience to the instruction of the court, returned a verdict finding the issues for them and the right of possession of the property in question in them. Upon the issues made by the counterclaim and reply the jury, at the close of the trial, found the plaintiffs guilty and assessed damages against them in the sum of \$650.00. From an appropriate judgment entered on this verdict, the plaintiffs appeal.

It is the theory of the plaintiffs that the Civil Practice Act of this state does not permit the filing of a counterclaim in an action of replevin. Section 1 of the Civil Practice Act (chap. 110, par. 125, Ill. Rev. Stat. 1953)

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provides: "The provisions of this Act shall apply to all civil proceedings, both at law and in equity, UNLESS THEIR APPLICATION IS OTHERWISE HEREIN EXPRESSLY LIMITED, in courts of record, except in attachment, ejectment, eminent domain, forcible entry and detainer, garnishment, habeas corpus, mandamus, NE EXEAT, QUO WARRANTO, replevin, or other actions in which the procedure is regulated by special statutes. As to all matters not regulated by statute or rule of court, the practice at common law and in equity shall prevail." Sub-paragraph (1) of Section 43 of that Act (chap. 110, par. 167 (1), Ill. Rev. Stat. 1953) provides: "Parties may plead as many causes of action, counterclaims, defenses, and matters in reply or rejoinder as they may have and each shall be separately designated and numbered." Sub-Paragraph (1) of Section 38 of that Act (chap. 110, par. 162, Ill. Rev. Stat. 1953) provides: "Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of SET-OFF, RECOUPMENT, CROSS-BILL IN EQUITY, OR OTHERWISE, AND WHETHER IN TORT OR CONTRACT, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross-demand in any action, and when so pleaded, shall be called a counterclaim." Supreme Court Rule 2 (chap. 110, par. 259.2, Ill. Rev. Stat. 1953) provides: "In the actions referred to by section 1 and subsection 2 of section 31 of the Civil Practice Act, the separate statutes shall control, TO THE EXTENT TO WHICH THEY REGULATE PROCEDURE IN SUCH ACTIONS, BUT THE CIVIL PRACTICE ACT SHALL APPLY TO MATTERS OF PROCEDURE NOT SO REGULATED BY SEPARATE STATUTES." (Emphasis supplied.) Section 21a of the

provided: "The Government of the United States of America, in and through the Department of State, hereby certifies that the information furnished to the Commission is true and correct to the best of its knowledge and belief."

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CONFIDENTIAL

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Replevin Act (chap. 119, par. 21a, Ill. Rev. Stat. 1953) provides: "The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder in courts of record, except as otherwise provided in this Act." Section 4 of the Civil Practice Act provides that it shall be liberally construed (chap. 110, par. 128, Ill. Rev. Stat. 1953).

In *Johnson v. Moon*, 3 Ill. 2d 561, the court had under consideration the proper construction to be given to various provisions of the Civil Practice Act. While the point at issue here was not involved in that case, the conclusions which the court reached therein are indicative of the correct solution to the question presented here. The court there said: (p. 567) "Any demands whatsoever of a defendant against a plaintiff may now be made the subject of a counterclaim regardless of their relation to the claim asserted by the plaintiffs (Secs. 43, 44; Ill. Rev. Stat. 1953, chap. 110, pars. 167, 168). Provision is made for consolidation and severance of issues and for the entry of more than one judgment in the same case. (Secs. 23, 24, 50, 51; Ill. Rev. Stat. 1953, chap. 110, pars. 147, 168, 174, 175)." The court also said: (p. 565) "Even if we assume that the language of section 38 limits counterclaims to original parties to the action, we cannot accept the view that it should be construed as an isolated text. No reason is advanced to support such a departure in this case from the established course, which contemplates that 'the several

provisions of the statute should be construed together in the light of the general purpose and object of the act, so as to give effect to the main intent and purpose of the legislature as therein expressed.' (People ex rel. Nelson v. Olympic Hotel Building Corp. 405 Ill. 440, 444.) This is the method which has hitherto been used in construing the Civil Practice Act. See Trapp v. Gordon, 366 Ill. 102, 108-9."

Section 1 of the Civil Practice Act provides that it shall not apply to a suit in replevin and certain other actions therein named. Standing alone, this section supports the contention of plaintiffs that a counterclaim is not permissible in such an action. This section, however, cannot be considered as an isolated text. It must be read in connection with the other provisions of the Civil Practice Act and the rules of the Supreme Court adopted pursuant to that Act. Rule 2 of the Supreme Court provides that the "Separate statutes regulating the separate proceedings mentioned in Section 1 of the Civil Practice Act shall control to the extent to which they regulate procedure in such actions, but the Civil Practice Act shall apply to matters of procedure not so regulated by separate statutes." (chap. 110, par. 259.2 Ill. Rev. Stat. 1953.) The Replevin Act does not mention counterclaims, but it does state in Paragraph 21 (a) that the provisions of the Civil Practice Act shall apply to it except as otherwise provided in that Act. Section 38 of the Civil Practice Act provides for the filing of a counterclaim, whether the counterclaim is in the nature of a set-off, recoupment, cross-bill in equity, and whether in tort or contract, and whether for liquidated or unliquidated damages, and Section 43,

Sub-paragraph (1) provides that parties may plead as many causes of action and counterclaims as they have. When all of these various sections are construed together, as they must be, the conclusion seems inescapable to us that a counterclaim may properly be filed to an action in replevin. There is nothing in the Replevin Act which prohibits it as is the case with the Forcible Entry and Detainer Act (chap. 57, Ill. Rev. Stat. 1953), where Paragraph 5 of that Act plainly prohibits the introduction into such a suit of any matter which is not germane to the distinctive purpose of that proceeding.

If a counterclaim is not permitted in an action in replevin, it would seem that the legislature, considering the number of years that the Civil Practice Act and the Replevin Act have been in effect, would have added a provision in the Replevin Act similar to that found in the Forcible Entry and Detainer Act. The Civil Practice Act, in our opinion, permits the filing of a counterclaim in a replevin action and the trial court properly so held.

The evidence introduced at the trial showed that plaintiff, Berg, and defendant, Henry, owned adjoining farms which were separated by a line fence running north and south. The two farms are located on a public road running east and west. Berg became the owner of his farm in 1940 and Henry in 1945. The fence, which seems to have caused all the trouble, starts at the public road and runs south 110 ~~xxxxxxx~~ yards. Berg's farm is east of the fence while Henry's farm is on the west. In support of his counterclaim, defendant, Henry, introduced certain proceedings had before the fence viewers

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in 1953. These proceedings showed that the fence viewers determined that the south portion of the line or division fence should be maintained by plaintiff, Berg. As a defense to said counterclaim, the plaintiffs sought to introduce evidence contradicting the decision made by the fence viewers. The court refused to admit such evidence and plaintiffs insist this was error. The statute expressly provides that the decision of the fence viewers shall be final upon the parties to the dispute and upon all parties holding under them. (Ill. Rev. Stat. 1953, chap. 54, par. 9) In view of this statute, the court was correct in refusing to admit the evidence offered by the plaintiffs, by which they sought to show that the determination made by the fence viewers was erroneous.

We have considered the other errors relied upon for reversal, but find them without merit. In our opinion, substantial justice has been done between the parties to this controversy and in the absence of reversible error, the judgment of the trial court is affirmed.

Judgment affirmed.

Convaldi, J. Concur
Crow, J. Concur

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the Democratic Republic of the Congo regarding the situation in the country.

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General No. 10973

Agenda No. 11

IN 1953

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SECOND DISTRICT

SECOND DISTRICT

October 26, 1953

12 I.A. 227

JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court, Second District

CITY OF KANSAS,

Plaintiff-Appellant,

vs.

JOSEPH R. BURNETT and
INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

Defendants-Appellees.

APPEAL FROM THE

CIRCUIT COURT,

KANSAS CITY.

Dove, J.

On October 26, 1953, City of Kansas brought this action against the defendant, Joseph R. Burnett, a contractor, and the surety on his performance bond, Indemnity Insurance Company of North America, to recover damages for an alleged failure on the part of the defendant, Burnett, to construct a sewer system for the City in accordance with a written contract entered into by the plaintiff and the defendant, Burnett. The answer of the defendant admitted the execution of the contract and bond, denied a failure to perform and insisted that the action was barred under the provisions of paragraph 10 of the contract, hereinafter referred to, because the defects complained of did not appear until more than one year after completion and acceptance of the work by the City. The issues made by the pleadings were submitted to a jury, and, after the plaintiff had closed its case and the defendant had introduced a certain letter in evidence, also hereinafter referred to, the court directed the jury to return a verdict in favor of the defendants. This was done and the court entered an appropriate judgment thereon and the plaintiff appeals.

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APPROVED COURT REPORT DISTRICT
CLERK OF DISTRICT
JAMES R. RICHARDSON

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The record discloses that on May 18, 1948, plaintiff entered into a written contract with the defendant, Burnett, for the construction of certain sanitary sewers and a sewage lift station in the City of Muncie, and on May 21, 1948, Burnett, as principal, and Indemnity Insurance Company of North America, as surety, executed a bond in favor of plaintiff in the sum of \$27,350.00 guaranteeing the performance of all things set forth in said contract. The plans and specifications were prepared by Hulford Engineering Service, as the representative of the city, and set forth in detail the type of work to be done and the kind of materials to be used as well as many other details of construction. The work provided for under this contract was completed on September 19, 1949, and final payment made on July 17, 1950.

It is the contention of the plaintiff that the defendant, Burnett, did not faithfully perform his agreement in that he used imperfect and defective materials and that the work was done in an inferior, unskilled, and unworkmanlike manner.

The controversy revolves around the construction to be given to paragraph 10 of the General Specifications of the construction contract relied upon by the defendants as a defense. This paragraph is as follows:

"10. Correction of work after final payment. Neither the final payment nor provision in the contract documents shall relieve the contractor of the responsibility for negligence or faulty materials or workmanship within the extent and period provided by law, and upon written notice, he shall remove any defects due thereto and pay for any damages due to other work resulting therefrom, which shall appear within one year after date of completion and acceptance."

At the trial, plaintiff introduced considerable evidence over the objection of the defendants which tended to support the allegations of its complaint with reference to the

THE HOUSE OF COMMONS

IN PARLIAMENT ASSEMBLED

THE 14TH DAY OF APRIL 1854

REPORT OF THE

COMMISSIONERS OF THE

LAND REVENUE

FOR THE YEAR 1853

BY

W. E. GLADSTONE

ESQ.

MEMBER OF PARLIAMENT

AND

SECRETARY OF THE

LAND REVENUE COMMISSION

use of inferior and defective materials and the performance of the work in an unskilled and unworkmanlike manner. The evidence showed the defects complained of were not discovered until more than a year after the work had been completed, and this was the basis of the defendants' objection to the evidence. At the close of the evidence offered on behalf of the plaintiff, the court denied defendants' motion for an instructed verdict. Thereupon the defendants offered in evidence a letter from Mulford Engineering Service, dated September 19, 1949, addressed to the mayor and city council of Moline, to the effect that the defendant, Burnett, had completed his work in accordance with the plans and specifications and recommending that he be paid the balance due under his contract, which was \$1943.20. Mulford ended his letter with this statement: "Note: Under the contract, the contractor is held responsible for his work for a period of one year from this date. See Paragraph 10 of General Specifications." What the trial court concluded was that the defendant contractor was not liable for the use of inferior or defective materials or for the unskilled or unworkmanlike manner in which the construction of the project was done beyond the period of one year from September 19, 1949, and held that since no defects appeared in Burnett's work within one year after the completion of the contract, plaintiff has no cause of action.

The effect of the trial court's interpretation of paragraph 10 is to disregard completely the first portion thereof. As we read paragraph 10, the plaintiff had the right to require the contractor, upon giving him written notice, to remove any

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defects in his work, if such defects shall appear within one year after the completion and acceptance of the work. After the one-year period, the plaintiff was given a remedy against the contractor for negligence for the use of faulty materials or workmanship "within the extent and period provided by law"; i.e., during the period embraced within the applicable limitation period. No reason appears why the first portion of paragraph 10 should be disregarded. The two clauses can be, and must be, read together and construed so as to give effect to each one. If the contractor were only required to correct defects which were discovered and written notice thereof given to him within one year, then there would be no use to have the first portion of paragraph 10 in the specifications. The rule is that whenever possible all the terms of a written instrument must be given effect. Not only should meaning and effect be given to every sentence, phrase, or clause, but to every word, and the reason for this rule is that it is presumed that all the provisions of a written contract were inserted therein deliberately and for a purpose, as parties ordinarily do not insert meaningless terms in their contracts. (Danville Hotel Co., for the use of Stevenson, v. Charles Benson, Inc., 262 Ill. App. 288, 293; McPike v. Luer, 230 Ill. App. 271, 274.)

The construction of a contract presents a question of law for a court to determine. (Carstens Packing Co. v. ^{Co.,} Sterne & Son/ 286 Ill. 355; Knowles Laundry & Machine Co. v. National Plate Glass Co., 301 Ill. App. 128, 167.) The meaning of a contract is for a jury to determine only when there is a mixed question of law and fact and then only under proper instructions. (Carstens Packing Co. v. Sterne & Son/^{Co.,} 286 Ill.

defined in the report of the

Joint Committee on the

Internal Security of the

United States, and the

Department of Justice

has been the subject of

extensive discussion

in the past few years.

The following is a

summary of the

main points of the

report.

The first point is

that the Department of

Justice has been

very successful in

its efforts to

maintain the

internal security of

the United States.

The second point is

that the Department of

Justice has been

very successful in

its efforts to

maintain the

internal security of

the United States.

The third point is

that the Department of

355,358; St. Louis Nat. Stock Yards v. Wiggins Ferry Co., 102 Ill. 514; Harrison v. Thackaberry, 248 Ill. 512.) Furthermore, in many instances, the use of defective materials and faulty workmanship would not be discovered for several years after the work was completed.

The two clauses of paragraph 10 provide independent remedies to the plaintiff, and they are not inconsistent with or repugnant to each other, and both should be given effect. The first portion of paragraph 10 permits the plaintiff to bring an action to the extent and within the period provided by law. The second portion obligates the contractor, in this instance Burnett, upon written notice, to remove defects which appear within one year after completion of the work. One remedy preserves the plaintiff's rights under the applicable limitation law, while the other permits the plaintiff, within a year after the completion of the work, to give the contractor written notice of defects in his work, which, he, the contractor, can then remedy.

The construction given to the contract by Mr. Mulford, engineer and agent of the plaintiff, was not binding upon the plaintiff. The construction of the contract which plaintiff's engineer gave is that stated in his letter to plaintiff, set out above, which concluded that under the contract the contractor is held responsible for his work for a period of "one year from this date." This notation on the engineer's letter does not refer to the remedy provided in the first portion of paragraph 10 but only to the one-year provision. The question then arises, is the engineer calling the plaintiff's attention to the fact

that the contractor must himself repair defects which are discovered within one year, or is he construing paragraph 10 as limiting plaintiff's remedy to an action brought within one year?

Mr. Mulford's interpretation of paragraph 10 would not be binding upon the city unless it could be shown he was acting within the scope of his authority, and his interpretation was a part of the *res gestae*. (*City of Chicago v. Jewish Consumptive's Relief Society*, 323 Ill. 389, 396.) There is no showing in this record that Mr. Mulford, an engineer, had any authority from the plaintiff, constructive or otherwise, to give legal interpretations of plaintiff's contracts, and it is unreasonable to assume that he meant to give a legal interpretation of the meaning of paragraph 10.

If it is assumed that the contract is ambiguous, as defendants assert, then it must be construed most strongly against them, as the contract on its face shows that it was prepared by the defendant, Burnett. (*Cedar Park Cemetery Ass'n. v. Village of Calumet Park*, 398 Ill. 324, 333; *Dixon v. Montgomery Ward & Co.*, 351 Ill. App. 75, 89.)

The trial court improperly directed the jury to return a verdict in favor of the defendants. This necessitates the reversal of the judgment rendered on that verdict, and the cause is remanded to the Circuit Court of Kankakee County for a new trial.

Everett J. Conover,
E. J. Conover

Judgment reversed and cause remanded.

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W. B. HIRSCHMANN,

Appellant,

v.

EMANUEL BERMAN, SIGMUND BERMAN,
ADDISON CONSTRUCTION AND
BUILDING MATERIALS CO., an
Illinois corporation, and
EMANUEL BERMAN and SIGMUND
BERMAN as trustees for
ADDISON CEMENT CO., an
Illinois corporation,

Appellees.

12 I.A.^{2d} 228

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

Plaintiff filed a complaint for accounting against the defendants. The cause was referred to a master in chancery for hearing and to report his conclusions of law and fact. The master's report, together with a supplemental report, found in favor of defendants, concluding that plaintiff was not entitled to an accounting and, further, that there had been a settlement and account stated between the parties. Exceptions were filed to the master's report and the chancellor, after hearing and argument thereon, entered a decree, pursuant to the master's report, in favor of defendants. Plaintiff appeals.

Plaintiff contends that the trial court was in error and that based on the evidence heard by the master he was entitled to an accounting. The brief filed by plaintiff does not follow subdivisions II, III and IV of Rule 7 of this court pertaining to the preparation of briefs. Under points and authorities he cites and argues

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the law supposedly applicable to the case. There is no statement of facts with appropriate reference to the abstract. The argument is not applied to the issues of law. This has handicapped the court in its effort to decide the case.

The complaint discloses that plaintiff and defendants Emanuel and Sigmund Berman became acquainted in 1945. The Bermans had incorporated the Addison Construction and Building Materials Company (hereinafter called Construction Company). As a part of their construction work, they had to subcontract the cement work. They informed plaintiff that there were substantial profits to be made if they could do their own cement work. They had no funds for this purpose. Plaintiff agreed to enter into a venture with them. They incorporated the Addison Cement Company (hereinafter called Cement Company) in June of 1946. Plaintiff furnished all the capital in the sum of \$3,067.57. The Bermans signed, executed and delivered to plaintiff notes for \$2,000 in payment of their two-thirds of the stock. These notes were to be paid from the profits of the Cement Company. The profits were to be computed on the cement work done for the Construction Company and others on the basis of labor and material being 60% of the price and the other 40% was to be profit. This was to be paid to the Cement Company. In January of 1947, by agreement of the parties, this was changed so that the profits would be considered 40% of the costs. Plaintiff contends that

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defendants failed to account for the profits due the Cement Company but instead used them to finance their various other endeavors; that they have concealed their records from the plaintiff; altered such records; refused to give plaintiff information on the various work done by the Construction Company; that they have connived and maneuvered to conceal their activities by placing certain accounts, assets, monies, or other valuables in trust so as to deprive plaintiff of his property, and diverted his profits to themselves, all with the intent to cheat and defraud plaintiff; that the defendants caused the Construction Company to take over the good will, assets, and business and profits of the Cement Company and thus to cheat and deprive plaintiff of his share of the business.

The complaint contained a number of other allegations as to property and assets of the Cement Company allegedly held in trust by the individual defendants and allegedly concealed by them from plaintiff. The complaint prayed that a proper accounting be taken under the direction of the court. The complaint alleged that the conduct of defendants was wilful and wanton and prayed for a special finding that malice is the gist of plaintiff's action.

Defendants' answer denied the essential allegations of the complaint and pleaded an account stated.

The issue to be decided is plaintiff's right to an accounting. This is primarily a question of fact and the burden is upon plaintiff. Over 400 pages of testimony

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was taken. It would serve no good purpose to burden this opinion with its details. It is sufficient to say that an examination of the record reveals that plaintiff was his only witness. The record discloses that at times his testimony was evasive and many of his statements were inconsistent. Sigmund Berman, one of the parties to the agreement, testified on behalf of defendants. It was stipulated by the parties that the testimony of Emanuel Berman would be the same as that of Sigmund Berman. Marvin Berman, a cousin of the Bermans, testified to the accounting between the parties after the dissolution of the business. Ann Demler, a secretary for the Construction Company, substantiated much of the testimony of Sigmund Berman and Marvin Berman. On the essential issues the testimony of defendants' witnesses is diametrically opposed to that of the plaintiff.

The master who heard and saw the witnesses concluded that plaintiff failed to prove he was entitled to an accounting. He further found that there was an account stated between the parties. An examination of the record reveals that there was substantial testimony introduced by defendants to support these findings and conclusions. In the case of Derkers v. Vaughan Co., Inc., 348 Ill. App. 407, 409, we said:

"Plaintiff in a suit for an accounting has the burden of proving his right to the desired accounting. Hickey v. Hickey, 371 Ill. 476; Lager v. Rea, 344 Ill. App. 438. Mere allegation of a good cause of action in the pleadings does not automatically give plaintiff the

right to a full-dress accounting.... The preliminary question which must always be answered in any suit demanding an accounting is whether or not plaintiff has established his right thereto.... In deciding this question, the master's findings of fact when approved, as here, by the chancellor will not be disturbed unless against the manifest weight of the evidence. Schnoor v. Terlep, 399 Ill. 101."

We cannot say that the decree was contrary to the manifest weight of the evidence.

Decree affirmed.

Schwartz and McCormick, JJ., concur.

Winnipeg, 20th Nov. 1914. The following
have been the results of the work done
during the last week. The work has been
done in the laboratory of the
University of Manitoba, and the results
have been published in the
Proceedings of the Royal Society of
Canada.

The work has been done in the laboratory of the
University of Manitoba, and the results
have been published in the
Proceedings of the Royal Society of
Canada.

Winnipeg

Winnipeg, 20th Nov. 1914.

The work has been done in the laboratory of the
University of Manitoba, and the results
have been published in the
Proceedings of the Royal Society of
Canada.

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46871

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN S. RUSCH,
Appellee,

v.

CHRIS MANER, also known as
JOSEPH GIRALAMO, et al.,
Appellants.

) 12 I.A.^{2d} 229
)
) APPEAL FROM COUNTY
)
) COURT, COOK COUNTY.
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JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

A contempt proceeding was filed by the Board of Election Commissioners of the City of Chicago seeking to have the respondents adjudged guilty of contempt of the County Court of Cook County for alleged misbehavior in the performance of their duties as judges and clerk of election in the seventh precinct in the first ward in the City of Chicago at the election held on November 2, 1954. The court denied a motion of the respondents for a bill of particulars and list of the People's witnesses. At the hearing the court heard witnesses on behalf of the State. The respondents neither took the stand nor put in any evidence. The court thereupon found the respondents guilty of contempt and sentenced each to serve nine months in the Cook County jail and to pay a fine of \$1,000.

In this court the respondents urge first that the trial court's denial of respondents' motion for a bill of particulars and a list of the People's witnesses prevented them from preparing their defense and thus deprived them of due process of law guaranteed by Article II of the Constitution of the State of Illinois; second, that the trial court's classification of the instant proceeding

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as one sounding in civil contempt rather than criminal contempt deprived the respondents of their rights which they would have had if the action was one in criminal contempt; and third, that the sentences and fines imposed by the court were excessive.

The judgment order entered in the County Court on August 11, 1955 finds that the cause was heard on the petition, amendment to the petition, and the rule to show cause theretofore entered against Chris Maner, also known as Joseph Giralamo, democratic judge; Joseph Greco, also known as Frank Tornabene, republican judge; and Joe Allen, also known as Tom Sullivan, alias Patrick Knight, republican clerk, and the answers of the respondents thereto; that evidence was presented on the part of the petitioner and that no evidence was offered on behalf of the respondents. The court further finds that at the general election held at Chicago, Illinois, on November 2, 1954 the respondents Joseph Giralamo, Frank Tornabene and Tom Sullivan had in April 1954, prior to the primary election of that year, applied for appointment as election officials in the names of Chris Maner, Joe Greco and Joe Allen, respectively, and that the said respondents in the election of November 2, 1954, in the seventh precinct of the first ward, in the City of Chicago, served as judges and clerk of election in the names of Chris Maner, Joe Greco and Joe Allen and by virtue of such service they became and were officers of the County Court of Cook County; that the respondents took

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over the duties of the judges of election, in initialing and handing out the ballots and in counting the same, and of the clerk of election in handing out and filing applications for ballots and recording the vote cast and counted; that the said respondents, while so acting as judges and clerk of election, knowingly, fraudulently and unlawfully made a false tally, canvass, proclamation and return of the votes cast in the said precinct at the said election; that they knowingly, fraudulently and unlawfully permitted persons' names to be voted more than once, permitted the same persons' names to be recorded in the poll list and permitted some person or persons to vote both names at said election. The court specifically finds that in eighteen instances applications signed in the names of the registered voters were not in the handwriting of the registered voters, but were written by some other person, and ballots were cast in the names appearing on each of said applications. The court also finds that Giralamo, Tornabene and Sullivan signed the names of Maner, Greco and Allen, respectively, to their applications for ballots at said election, and that they fraudulently and incorrectly certified to the board of election commissioners the vote cast in the said precinct.

From the record before us it appears that the evidence adduced in the hearing furnished a sufficient basis for the court's findings.

The first point made by the respondents, that they were deprived of due process of law as guaranteed by

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Article II of the Constitution of the State of Illinois, raises a constitutional question. This court has no power to pass on constitutional questions (People v. Richardson, 397 Ill. 84; People v. Terrill, 362 Ill. 61; People ex rel. Austin v. Board of Com'rs, 316 Ill. App. 621; Brandtjen & Kluge, Inc. v. Forgue, 299 Ill. App. 585), and therefore the matter is not properly before us and we cannot consider it.

The second point made by the respondents is that the trial court's classification of the proceeding as one sounding in civil contempt rather than criminal contempt was a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Again, as we have pointed out, this court has no power to pass on constitutional questions. However, in their oral argument the respondents took the position that the question was one involving the interpretation of the election code, and hence is a matter with which this court can properly deal. The respondents admit that the Supreme Court of Illinois has on numerous occasions declared that proceedings of the nature herein involved are actions for civil rather than criminal contempt, and counsel in their brief urge that such holdings are erroneous and contrary to the holdings generally in other jurisdictions, citing the comment on the case of People ex rel. Rusch v. Fusco, 397 Ill. 468, appearing in 15 University of Chicago Law Review, p. 438. In the comment attention is called to the

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fact that under the rules governing civil contempt the respondents have not the same rights that they would have under the rules governing criminal contempt, in that in a criminal contempt the evidence must establish the guilt of the defendants beyond a reasonable doubt (People v. Spain, 307 Ill. 283). The comment also criticizes the Illinois statute, sec. 14-5 of the election code (Ill. Rev. Stat. chap. 46, par. 14-5), which provides, among other things, that such election officers are officers of the court "and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral testimony in a summary way, without formal pleadings, but such trial or punishment for contempt of court shall not be any bar to any proceedings against such officers, criminally, for any violation of this act," as being in violation of due process, and points out that the interpretation given the statute by the Illinois Supreme Court in refusing to consider the proceedings as criminal contempt has further deprived offenders of the safeguards which they might have if it were so held. The comment also points out that at the time when the Supreme Court held the proceeding to be one in civil contempt the "compurgation" rule applied, under which a defendant might, in a criminal contempt action, purge himself of contempt by his sworn answer, and it is intimated that the existence of that rule could have been the basis for the court's holding.

The constitutionality of the statute was upheld

in People v. Hoffman, 116 Ill. 587, Sherman v. People, 210 Ill. 552, and People v. Gordon, 274 Ill. 462. In People v. White, 334 Ill. 465, the court specifically found that while the power to punish for contempt is inherent in a court, the legislature may aid the jurisdiction or enlarge the powers of the court by declaring certain improper conduct to be a contempt of court, though the same had not been theretofore so regarded; that accordingly the legislature was within its constitutional rights in providing that the court could proceed against judges and clerks of election by way of contempt proceedings; and that under the provision in the statute the respondent could not purge himself of contempt by filing a sworn answer denying the charges of misconduct. In People v. Fusco, 397 Ill. 468, the court stated that it has been repeatedly held that a contempt proceeding under section 14-5 of the election code is a proceeding for civil contempt, citing cases. However, in People v. Gholson, 412 Ill. 294, the Supreme Court stated: "The doctrine of 'purgation by oath' will no longer be adhered to by this court, and all previous decisions of this court upholding and applying that doctrine, in that respect, are hereby expressly overruled."

The holdings of the Supreme Court are binding on this court, and we cannot speculate on what the Supreme Court might do if the matter was reconsidered by it in the light of People v. Gholson, supra. There is no merit in the respondents' contention before us.

The respondents also urge that the sentences imposed were excessive, and in support of that contention they cite People ex rel. Rusch v. Levin, 305 Ill. App. 142, People ex rel. Rusch v. Garbacz, 309 Ill. App. 443, and People ex rel. Rusch v. Williams, 292 Ill. App. 228. In each of these cases, as the opinions indicate, there was evidence as to good character or lack of intentional wrongdoing on the part of the defendants. Here the respondents neither took the stand themselves nor brought in any witnesses to testify in their behalf. As we have stated, there is sufficient evidence in the record to support the findings of the trial court. On the record before us, we cannot arbitrarily say that the sentences imposed were excessive.

The judgment of the trial court is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

Gen. No. 10914

Agenda No. 24

IN THE

FILED

APPELLATE COURT OF ILLINOIS

NOV 28 1956

SECOND DISTRICT

JULIUS R. RICHARDSON
CLERK, PRO TEMPORE
Appellate Court Second District

12 I.A. 230²⁶¹

DOROTHY LINENFELSER and ROY LINENFELSER,
Appellants

-vs-

PAUL CLINKMAN,

Appellee

Appeal from the
Circuit Court of
Winnebago County.

Gen. No. 10915

Agenda No. 24

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PAUL M. CLINKMAN,

Plaintiff-Appellee,

-vs-

ROY C. LINENFELSER,

Defendant-Appellant

Appeal from the
Circuit Court of
Winnebago County.

CROW, J.

These two suits, growing out of the same occurrence, were consolidated for trial purposes by the Circuit Court of Winnebago County, and are being considered together on this appeal.

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Case No. 10013

APPELLATE COURT

FILED

NOV 28 1956

JULIUS R. RICHARDSON
CLERK, DISTRICT COURT
Appellate Court, Second District

IS I.A. 530

[Faint, mostly illegible text and markings throughout the page, including horizontal lines and scattered characters.]

The first suit is a common law negligence suit by the plaintiff driver, Roy C. Linenfelser and Dorothy Linenfelser, a passenger in his automobile, against Paul Clikeman, driver of another automobile, for personal injuries and property damage resulting from an automobile collision which occurred when the automobile of the plaintiff, Roy C. Linenfelser, collided with the defendant's automobile.

The second suit is by Paul E. Clikeman against Roy C. Linenfelser, charging common law negligence and seeking damages to his person and damages to his automobile.

The jury returned two verdicts, one finding Paul Clikeman not guilty as to the complaint in cause No. 10914, and a verdict in No. 10915 in favor of Paul Clikeman and awarding damages to him in the sum of \$75,000.00. The trial court entered judgments on the verdicts and thereafter overruled motions of Dorothy Linenfelser and Roy C. Linenfelser for judgment notwithstanding verdict and for new trial.

The appellants contend that the verdicts are against the manifest weight of the evidence; that plaintiff Clikeman's given Instructions Nos. 4, 10, 16, 17 and 18, are erroneous and prejudicial; that the trial court erroneously refused the defendant, Roy Linenfelser, Instructions Nos. 16, 22 and 23.

There is a conflict in the evidence as to what occurred at the point where the two cars collided, but there are certain undisputed facts in evidence which are substantially as follows: On July 20, 1952, at about 7:00 o'clock p.m., D.S.T., while still daylight, Roy Linenfelser was driving his 1949 4-door Dodge automobile in a northerly direction upon a north and south highway known as Owen Center Road, northwest of the City of Rockford,

The first and most common law violation is the use of a vehicle as a weapon. This is often done in a drive-by shooting or a ramming incident. In a drive-by shooting, the driver fires a weapon at a victim while driving. In a ramming incident, the driver intentionally or recklessly drives into a crowd of people or a building. Both of these actions are considered extremely dangerous and are often the result of a driver's anger or desire for revenge.

Another common law violation is the use of a vehicle to flee from law enforcement. This is often done in a high-speed chase or a PIT maneuver. In a high-speed chase, the driver intentionally or recklessly drives at a high speed to evade police officers. In a PIT maneuver, the driver intentionally or recklessly drives into the side of a police vehicle to disable it. Both of these actions are considered extremely dangerous and are often the result of a driver's desire to escape the law.

Finally, another common law violation is the use of a vehicle to commit a crime. This is often done in a carjacking or a robbery. In a carjacking, the driver uses a vehicle to transport a victim to a safe location. In a robbery, the driver uses a vehicle to transport stolen goods. Both of these actions are considered extremely dangerous and are often the result of a driver's desire for money or power.

These are just a few of the most common law violations involving vehicles. There are many other violations that can be committed, such as driving under the influence of alcohol or drugs, and driving without a valid license. All of these violations are considered dangerous and can result in serious consequences for the driver and others on the road.

Winnebago County, Illinois, approaching the intersection of said highway with an east and west road known as Latham Road. He was accompanied by his wife, Dorothy Linenfelsner, and two friends, Lee Matheson and his wife, Ruth Matheson. Lee Matheson was riding in the righthand side of the front seat, Ruth Matheson was riding in the righthand side of the rear seat, and Dorothy Linenfelsner was riding in the lefthand side of the rear seat. Roy Linenfelsner and his wife and friends were intending to go to Edgerton, Wisconsin by way of Beloit. Owen Center Road upon which Roy Linenfelsner's car was traveling was a through highway protected by stop signs on the east and west side thereof at the intersection of Latham Road and Owen Center Road. As Roy Linenfelsner's car approached the said intersection, Paul Clikeman was driving his 1947 Chevrolet automobile in an easterly direction upon Latham Road. The two cars collided at the intersection resulting in the Clikeman car being struck by the Linenfelsner car at about the front door on the right side. As a result of the impact, Linenfelsner's car swung around and stopped headed south slightly north of the point of impact, and Clikeman's Chevrolet automobile continued in a northeasterly direction, striking a tree and throwing the plaintiff therefrom.

The intersection of these two roads is at the bottom of a dip or valley, made by Owen Center Road. The distance from the intersection to the crest of the hill on Owen Center Road south of the intersection is 600 feet, and the crest of the hill on Owen Center Road north of the intersection is at a distance of some 400 feet. Both Latham Road and Owen Center Road are of blacktop construction. Latham Road is about 18 feet wide and

Winnipeg County, Minnesota, approximately 10 miles north of
Highway 150 on east and west side of Highway 150.
was accompanied by his wife, Mary, and two children, a son and a daughter.
The husband was 40 years of age, and the wife was 35 years of age.
They had two children, a son and a daughter, both of whom were under 10 years of age.
The husband was a farmer and the wife was a housewife.
They had been married for 10 years and had lived in the same place for 10 years.
The husband was a member of the Lutheran Church and the wife was a member of the same church.
They had no other relatives living in the neighborhood.
The husband was a good man and the wife was a good woman.
They were both very kind and helpful to their neighbors.
The husband was a very good father and the wife was a very good mother.
They were both very good people and were very much loved by their neighbors.
The husband was a very good man and the wife was a very good woman.
They were both very kind and helpful to their neighbors.
The husband was a very good father and the wife was a very good mother.
They were both very good people and were very much loved by their neighbors.

Owen Center Road is about 26 feet wide. A school house is located at the southwest corner of the intersection, and is about 80 feet west of Owen Center Road and about 50 feet south of Latham Road. On the northwest corner a church and Town Hall are situated. A farm house and farm buildings are located on the northeast corner. There is an open field on the southeast corner. The area is known as the Village of Owen Center.

Clikeman's witnesses consisted of himself, David Mathews, and Isaac Smith. Linenfelser's witnesses were Dorothy Linenfelser, himself, Lee Matheson, and Ruth Matheson.

The only eye witness testifying for the plaintiff Clikeman was David Mathews. He was driving south on Owen Center Road going between 40 and 45 m.p.h. immediately north of the intersection of Owen Center Road and Latham Road. As he came over the knoll of a hill north of the intersection he saw a car pulling out onto Owen Center Road off the sideroad going east and coming from the west. When he first saw the Clikeman car it was just entering Owen Center Road and it appeared to be going 10 m.p.h. At about the same time he saw a northbound car, a Dodge, which was about 300 feet away. He estimated the speed of the Dodge car at about 50 to 60 m.p.h.

Clikeman, the driver of the Chevrolet going east, testified substantially as follows: that he was going to his home about 3 or 4 miles east of the Owen Center Road on Latham Road; that he knew there was a stop sign at the intersection; that he stopped his car about 40 feet west of the intersection and observed a man driving a 1938 Plymouth coming from the north and going south on Owen Center Road and that he waited for this automobile to go by. After that he looked both ways to see if there was any more traffic and there was not. That he looked to the

[illegible]

north and there was no traffic and then put his car in first gear and started towards the intersection; that he did not stop his automobile again at any time before he crossed the Owen Center highway; that he did not look to the right again after he slowed up, and that the last thing he remembered he woke up and a nurse was standing over him.

At another point in his testimony he said that he stopped at the edge of the highway, looked both ways and saw nothing approaching, and then drove onto the highway and was immediately struck by the defendant's car without ever having seen defendant's car approaching.

Paul Clikeman, the plaintiff, was well acquainted with the surroundings and this particular intersection in question. On the evening in question he was doing some cobining on a farm $2\frac{1}{2}$ miles west of this intersecting corner. To go between a farm where he was working and his home he would go directly east on Latham Road.

It is the duty of a person approaching a place of danger to do so cautiously and with a proper degree of care for his own safety. The law will not permit one, under such circumstances, to claim that he looked but did not see the danger where the view was unobstructed and where, if he was properly exercising his sight, he would have seen it: DEE v. CITY OF JERU, 345 Ill. 36.

As was said in MOORE v. ILLINOIS POWER AND LIGHT CORPORATION, 286 Ill. App. 445, the question of due care is a question for the jury when there is any evidence given on the trial which, with all legitimate inferences that may be legally and justifiably drawn therefrom, tends to show the use of due care, but when the evidence does not show this, then the verdict for the

North and there was no traffic at that time. The
gate and station between the two sections of the road
his automobile back at the station. The police
Gordon H. Hays, who was the first to see the car
as shown by the fact that the car was seen
and a man who was with the car.

At about 10:30 p.m. the car was seen
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plaintiff should not be permitted to stand.

Whether there is any such evidence is a question of law. In determining such question we can examine the record only to determine whether there is any evidence so tending to support the cause of action. Applying this rule and the rule as to the manifest weight of the evidence to the record, it seems to us that although we cannot say the actions of Paul Clikeman, under the circumstances, constitute negligence or contributory negligence as a matter of law, yet the two verdicts which, in effect, find him not guilty of negligence and not guilty of contributory negligence are contrary to the manifest weight of the evidence, and, under those circumstances, it is our duty to set the verdicts aside.

As we are of the opinion the verdicts are against the manifest weight of the evidence, it is unnecessary to consider other errors urged. The judgments are, therefore, reversed in each case and the causes remanded, with instructions to allow the motions of Roy Linenfelser and Dorothy Linenfelser for new trials.

REVERSED and REMANDED,
with instructions.

Dave P. J. Conners
Ewald L. Conners

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46932

CHARLES SHEMAITIS,

Appellant,

v.

LE ROY FROEMKE,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

12 I.A. 231

JUDGE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action for false imprisonment against defendant Froemke and his attorney, alleged to have resulted from plaintiff's wrongful incarceration for contempt of court. This court affirmed the order striking the complaint and dismissing the cause as to defendant's attorney. (6 Ill. App. 2d 323.) The present matter involves the second amended complaint which was stricken on defendant Froemke's motion and the cause dismissed. Plaintiff appeals.

Plaintiff was named a defendant in a partition suit instituted by his wife. They held the property involved in that suit as joint tenants. Pursuant to a decree, the property was ordered sold and defendant Froemke was the purchaser at the judicial sale. May 4, 1948, the master's report of the sale of the property to Froemke was approved. Attached to the second amended complaint as exhibits are the decree directing partition of the property in question, the approval of the commissioner's report and the master's report of sale.

After alleging the foregoing facts, plaintiff's second amended complaint states that Froemke instituted an action for forcible entry and detainer in the Municipal

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Court of Chicago; that while the Municipal Court action was pending, Froemke on July 21, 1948, petitioned the Circuit Court of Cook County, which had decreed the sale of the premises, for an order directing plaintiff to vacate the premises or pay rent; that the petition to vacate the premises was filed more than thirty days after the court had entered its decree directing the sale of the premises; and that upon plaintiff's refusal to comply with the order to vacate the premises, plaintiff was sentenced to jail for contempt of court.

Plaintiff contends that his second amended complaint states a good cause of action on several grounds: (1) that the order to incarcerate plaintiff was void because it was obtained more than thirty days after the decree of partition was entered in the Circuit Court; (2) that when defendant sought relief in the Circuit Court he failed in his petition to inform the trial judge that an action for similar relief was pending in the Municipal Court of Chicago; and (3) that the order committing plaintiff to jail was obtained by defendant Froemke who was not a party to the original suit.

As to plaintiff's first contention, it appears that this precise question was raised, argued and determined adversely to plaintiff in the former proceeding (6 Ill. App. 2d 323), where we said that,

"The rule with reference to the court's loss of jurisdiction over its judgments after the expiration of the term merely bars the court's right to alter, modify or change them but does not preclude their enforcement as

[illegible]

originally rendered. 49 CJS, Section 585, page 1072. The petition filed by Froemke in the Circuit Court was, in effect, an application for a writ of assistance. This is a summary proceeding the sole object of which is to put a person in possession who has purchased property at a judicial sale under a decree in chancery. The writ of assistance is properly employed whenever a court of equity having jurisdiction of the person and property in controversy has determined the rights of the litigants to title or possession of real estate or has agreed to a sale of the property, the writ being part of the process employed in enforcing the decree itself. (Stubbs v. Austin, 285 Ill. App. 535.)"

Plaintiff maintains that the filing of the petition by defendant in the Circuit Court praying for the same relief being sought by him in an action in the Municipal Court constituted fraud and malice. In support of his position, plaintiff relies on Meyer v. Meyer, 333 Ill. App. 450, which holds in effect that a decree entered by a court which lacks jurisdiction of the parties and the subject matter is void and may be attacked at any time. The case last cited is inapplicable since in the case at bar the court did have jurisdiction of the subject matter and the parties.

Plaintiff has cited no Illinois law, statute or decisional, to sustain his contention. Nor has our attention been called to any law that bars defendant from simultaneously pursuing all the remedies available to him for the purpose of obtaining possession of the premises occupied by plaintiff.

With respect to plaintiff's remaining contention we held in our former opinion (6 Ill. App. 2d 323) that defendant Froemke's petition in the Circuit Court was in effect an application for a writ of assistance and that the writ was part of the process employed in enforcing the decree

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description of the project. It includes the
purpose of the study, the objectives, and the
scope of the work. The second part is a
review of the literature. It discusses the
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third part is a description of the methods
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The fourth part is a presentation of the
results. It includes the data, the analysis,
and the conclusions. The fifth part is a
discussion of the results. It includes the
interpretation of the findings, the limitations
of the study, and the implications for future
research.

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itself. After purchasing the premises in controversy at a judicial sale, Froemke in order to protect his interest had a right to petition the court for assistance. The fact that he was not a party to the original suit was immaterial since, as heretofore stated, the relief sought by the petition was in aid of the former decree directing the sale. In short, the court was not divested of its inherent power to enforce its decree after thirty days.

So far as the pleadings show, plaintiff did not appeal from the order adjudging him guilty of contempt which resulted in his incarceration. Therefore, we must assume that his imprisonment was under legal process. In these circumstances, the charge of false imprisonment will not lie.

For the reasons given, the order dismissing the cause is affirmed.

AFFIRMED.

FEINBERG, P.J., AND KILEY, J. CONCUR.

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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

Term No. 56M5 ✓

Agenda No. 4

LOIS JAYNE SHAPPEE,)
)
PLAINTIFF-APPELLEE,)
)
VS.)
)
BARTLETT SHAPPEE,)
)
DEFENDANT-APPELLANT.)

12 I.A.^{2d} 363

Appeal from the
Circuit Court of
Madison County.

BARDENS, J.

This is an appeal from a divorce decree entered by the Circuit Court of Madison County and from an order overruling defendant's Motion to Set Aside Decree for Divorce. The matter was heard without a jury. Defendant urges that the decree is against the manifest weight of the evidence.

Before considering defendant's contention, we must treat of plaintiff's allegation that the appeal should be dismissed because not taken within the statutory period. Ill. Rev. Stats. (1953) Chap. 110, Paragraph 200. The decree was entered February 23, 1955; the Notice of Appeal was filed September 28, 1955, more than 90 days after the entry of the decree. However, on March 4, 1955, a Motion to Set Aside Decree for Divorce was filed by

defendant alleging a failure of proof of the allegations of the complaint and a variance in pleadings and proof. This motion was argued on September 9, 1955, and denied by the trial court. The question raised is as to the effect of this particular motion as a stay of the 90 day period for appeal.

Paragraph 83 of the Judgment Act, Chap. 77, Ill. Rev. Stats. (1953) provides as follows:

"Any such judgment, decree or order may hereafter be modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days, wherever, under the law heretofore in force, it might have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term."

As a general proposition, it is clear that when a motion is filed under this section, the decree or judgment does not become final and the 90 day appeal time start to run until such motion is disposed of. *Maren v. Wolner*, 343 Ill. App. 353, 99 N.E. (2d) 213; *Goldblatt v. Perlman*, 338 Ill. App. 654, 88 N. E. (2d) 377; *Lenhart v. Miller* 375 Ill. 346, 31 N. E. (2d) 781; *Corwin v. Rheims*, 390 Ill. 205, 61 N. E. (2d) 40. However, plaintiff urges that defendant's motion was in the nature of a motion for a new trial which can serve no purpose in a non-jury case, and directs our attention to the case of *Atlas Finishing Co. v. Anderson*, 336 Ill. App. 167, 83 N. E. (2d) 177. In passing, we note that the new Civil Practice Act has

eliminated this area of uncertainty by specifically providing for motions after a decree or judgment in non-jury cases. Ill. Rev. Stats. (1955) Chap. 110, Paragraph 68.3. Examining the Atlas case, in which there was a dissenting opinion, it is to be observed that the motion filed therein was designated as a motion for a new trial. In the instant case, the motion in substance and name was a motion to vacate the decree and properly raised matters for consideration by the chancellor within the 30 day period following entry of the Decree in accordance with Paragraph 83 of the Judgment Act. Having been filed within 90 days of the disposition of such motion, the appeal was therefore timely.

We turn then to defendant's contention that the Decree is against the manifest weight of the evidence. Plaintiff's complaint alleged two specific acts of cruelty which were denied by defendant's Answer. The first instance, as related by plaintiff, was as follows:

"It happened in our home where we were living at the time. He tried to make me kiss him; I didn't want to. I was extremely disturbed by the way he was acting, and he held my cheeks the way you would force a horse to open its mouth, and I suffered as the result of that. I had some bruises which I was able to cover up with makeup for school."

The second instance, as described by plaintiff, likewise occurred in their home. On this occasion, defendant picked her up, carrying her over his shoulder to get through a doorway, in the process of which maneuver, plaintiff's rib was allegedly fractured by a

pill bottle in her pocket. She observed that, "My husband was perhaps a little angry at that time." She further observed that, "He was not cruel to me on other occasions."

The "extreme and repeated cruelty" section of the statute has been construed many times to mean "physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm." *Moore v. Moore*, 362 Ill. 177. In *Berlingieri v. Berlingieri*, 297 Ill. App. 119, the court interpreted the statute as requiring a showing of a state of personal danger incompatible with the marriage state. That the defendant's conduct in the instant case falls short of this standard of misconduct is apparent. By plaintiff's testimony alone, it is clear that any injury to plaintiff was unintended. Further, standing alone as they do by plaintiff's own admission, these two acts scarcely created a situation of personal danger incompatible with the marriage relation. We therefore conclude that a finding of extreme cruelty is not supported by the evidence and the decree was therefore contrary to the manifest weight of the evidence.

Motion to dismiss appeal denied. Decree reversed.

Scheineman, P. J., and Culbertson, J., concur.

Publish abstract only.

FILED

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David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

46920

LEONA BARANA, Administrator of the
Estate of LOUIS M. BARANA, deceased,

Appellee,

v.

JAMES A. HANNAH, INC., a corporation,

Appellant.

12 LA^{2d} 364

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a wrongful death action (Chap. 70, Pars. 1 and 2, Ill. Rev. Stat. 1953) with verdict and judgment for plaintiff for \$7500. Defendant has appealed.

Plaintiff's decedent died as a result of injuries suffered in a collision between his passenger car and defendant's tractor and double trailer. The collision occurred at 111th Street, which runs east and west, and the Southwest Highway, which runs generally in a northeasterly-southwesterly direction, but at this point runs almost north and south. Plaintiff's decedent was driving west on 111th Street and the tractor-trailer was being driven northeasterly. At the time there were "Stop State Route" signs controlling traffic on 111th Street at the Southwest Highway, and "Intersection" signs on the Highway about two hundred feet north and south of 111th Street. The collision occurred in the intersection and the drivers of both vehicles were killed.

Defendant contends the court erred in refusing to direct a verdict in its favor for want of sufficient evidence of Barana's due care and defendant's negligence. On this contention we consider only the evidence favorable to plaintiff's decedent, together with legal inferences drawn therefrom most strongly in his favor, and reject contradictory and contrary evidence. (March v. Hirshman, 137 N. E. 2d 279.)

There is testimony that Barana, in the employ of the State's Attorney of Cook County, was engaged in an investigation at Palos Heights, which is southwest of the City of Chicago. There was further testimony that during his lifetime Barana was a "most skillful driver, alert and tireless," and always stopped at stop signs. This evidence of careful habits was admissible since there were no witnesses to testify to what occurred, and this proof was sufficient to take the case to the jury on the question of due care. (Casey v. Chicago Railways Co., 269 Ill. 386, 390, 391; Hughes v. Wabash R. Co., 342 Ill. App. 159, 168.) We see no physical facts which preclude a presumption from the evidence that the decedent customarily was careful and stopped at stop signs, and that he stopped at the 111th Street stop sign. Neither the position, nor condition of the vehicles after the collision precludes the presumption. The front of the tractor was not damaged and the front of the decedent's car was, but this does not preclude the idea of due care, since these facts are consistent with the inference of the truck hooking the front of decedent's car and drawing it against the side of the speeding truck. And we are not to draw an unfavorable inference against decedent from such facts. The jury could infer that decedent stopped at the stop sign, looked south and saw no vehicle approaching, looked north and saw no vehicle approaching, and then drove carefully out into the intersection.

We think the only case cited by defendant on this

point that needs distinguishing is Ritter v. Nieman, 329 Ill. App. 163. Plaintiff's decedent there was in a car, on a preferred highway, and defendant was driving a truck on a narrow country road. There was testimony that plaintiff was in the exercise of due care and that defendant stopped at the stop sign, looked north and could see "six to eight hundred feet," saw nothing, started into the highway, and did not see the other car until he struck it near the rear. The trial court directed a verdict for defendant at the close of all the evidence. The Appellate Court in reversing and remanding thought the defense testimony absurd, and stated that a motorist cannot proceed blindly through a protected intersection, "saying he looked and did not see when there is nothing to prevent it." In the instant case there was an incline about 200 feet south of the intersection which could have prevented Barana from seeing the truck, and the jury may have reasoned that, under the circumstances, Barana was not negligent if he failed to see it.

Among other charges of negligence, plaintiff alleged that defendant operated its truck at a high and dangerous rate of speed. The evidence most favorable to plaintiff is that the truck left defendant's garage at 5:00 a.m.; that the burning vehicles were reported to a fire station at about 5:15 a.m.; that the distance between the garage and the intersection where the collision occurred was about thirteen miles; that the route taken included one mile through the village of Lemont under a 15 mile per hour speed limit and five stop signs; that the lawful speed for the truck on the

Highway was 40 miles per hour; that after the collision the tractor was 150 feet and the trailer 300 feet beyond the intersection; and that the truck was hauling about twenty-two tons of high octane gasoline.

Plaintiff argues for inferences upon the testimony that the truck was being driven at a speed of "at least 52 miles per hour," and that the truck could have travelled at this speed from the hill south of the intersection to the point of collision in about 2.22 seconds. Defendant insists that its testimony that "the truck would not let him (the truck driver) go faster than 40 miles an hour" presents a physical impossibility precluding an inference of excessive speed.

There is no merit to the contention that a physical impossibility was presented by that testimony. We are referred to no physical law which would render impossible the truck's moving at a speed of 52 miles per hour. This testimony, as well as unfavorable inferences drawable from the location or condition of the vehicles, or an inference that a governor limited the truck's speed are matters of defense. The same is true of the condition of alertness of plaintiff's decedent.

With respect to right of way of the truck and the location of the impact, we think the jury could have considered it probable that decedent stopped at the stop sign, looked south and saw nothing approaching, then looked north and

seeing no vehicle approaching drove out one quarter of the way into the intersection when the truck sped three quarters through the intersection and into the collision. Inferences favorable to defendant are matters of defense not to be considered on this question of law.

We think the rule stated in Lindroth v. Walgreen Co., 407 Ill. 121, 130, is decisive: "If, from the circumstances revealed by the evidence, it is reasonable to infer" that the truck drawing the trailer loaded with gasoline was travelling at a high rate of speed at the time of collision, the question of negligence was properly submitted to the jury. We think there is proof of enough circumstances to warrant the inference and that the inference is reasonable. Where circumstantial evidence is the highest degree of proof available, "it must be accorded the same judicial concern as are other types of evidence." (Robinson, Admx. v. Workman, 9 Ill. 2d 420, 428.)

Finally, we think that the Lindroth case and the cases there cited to support the decision (Lavender v. Kurn, 327 U. S. 645; E. K. Wood Lumber Co. v. Andersen, 81 F.2d 161) are authority for our conclusion that there was evidence sufficient to take to the jury the question of proximate cause. The inference of unlawful speed and of proximate cause are sustained by the same evidence (Ohio Bldg. Vault Co., v. Industrial Board, 277 Ill. 96, 112, 113), and the second inference is not vulnerable to the objection that it is drawn from an uncertain source.

For the reasons given, the judgment is affirmed.

AFFIRMED.

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Aronda No. 5

SACOND DISTRICT

October Term, A.D., 1956

12 I.A.^{2d} 265

Defendants-Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
PEORIA COUNTY,
ILLINOIS.

The tract involved in this proceeding is rectangular in shape, 220 feet east and west and 120 feet north and south. It is a vacant lot located at the northeast corner of the intersection of United States Route 150 and North University Avenue in the City of Peoria and is bounded on the north

by Stratford Drive. Upon the hearing, plaintiffs introduced a plat showing the location of their property and the zoning classification of the surrounding property in the neighborhood and the uses made of the same. This plat shows that approaching the property in question from the city of Peoria for approximately one mile on both sides of University Avenue are properties which are zoned commercial or for light industry. The property located to the north and to the east of the property in question is zoned residential, and the Zoning Board, after viewing the property, found that the value of the residences located in this area ranged from \$18,000.00 to \$35,000.00. Immediately to the south of plaintiffs' property and adjoining Route 150 is a small 20-foot-wide-triangular-shaped tract, not owned by the plaintiffs, which is zoned commercial. Across Route 150 to the south, and being the southeast corner of the intersection, is a gasoline filling station operated by the Shell Oil Company and across the street diagonally from plaintiffs' property, and being the southwest corner of the intersection, is a filling station of the Standard Oil Company. Across the street from plaintiffs' property to the west is a trailer sales court. The trailer sales court occupies an area 480 feet east and west and 200 feet north and south. This sales lot has on it a trailer sales office as well as many trailers on display.

At the present time, plaintiffs are operating a root-beer stand on the property which is located just south of the Shell Filling Station. They operate this root-beer stand on leased premises and they have been notified by their landlord that their lease will not be renewed when it expires in May, 1957. It is their desire to move their root-beer stand from

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THE SECRETARY OF THE
TREASURY
WASHINGTON, D. C.

DEAR SIR:

Yours of the 10th inst.

has been received.

Very truly yours,

W. A. RORER

Director

Internal Revenue Service

Washington, D. C.

cc -

Mr. Tolson

Mr. E. A. Tamm

Mr. Clegg

Mr. Glavin

Mr. Ladd

Mr. Nichols

Mr. Rosen

Mr. Tracy

Mr. Carson

its present location to the tract involved in this proceeding. The ordinance zoning this property was adopted in 1948 and the plaintiffs purchased it on July 25, 1952. In 1948, when the zoning ordinance was adopted, this property was zoned residential and it has since so remained, although this is the second time that the Zoning Board of Appeals has denied an application to rezone this property from residential to commercial.

The traffic at the intersection of U.S. Route 150 and North University Avenue is exceedingly heavy. The evidence introduced shows that in a survey made by the State Traffic Department in 1964 an average of nine vehicles a minute use this intersection for every minute of the day for the full twenty-four-hour period. Because of the heavy traffic and because the other three corners of the intersection are zoned commercial and are being used for commercial purposes, the plaintiffs assert that their property is far better adapted to commercial purposes than it is to residential purposes. Further, they insist that its value would be greatly increased if its classification were changed from residential to commercial. These contentions are the basis for their claim that the Zoning Board's refusal to change its classification was arbitrary and capricious and bore no relation to the public welfare.

A number of the residents living on Stratford drive, which, as stated, bounds plaintiffs' property on the north, appeared at the hearing and strenuously objected to the changing of the classification of this property to commercial and the establishing by the plaintiffs of a root-beer stand thereon for the reason that they believed the operation of a root-beer stand on this tract would result in a lot of additional noise,

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LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637

dust, dirt, paper and litter in the area. Also, they felt there would be an increase in traffic on Stratford Drive, where the traffic is fairly light at the present time, and, of course, there would be the customary electric lights in the evening around plaintiffs' stand.

The written consents of twenty-six persons residing in the general locale of the area sought to be rezoned were offered in evidence. Some of these parties resided several blocks from the plaintiffs' tract. The consent which they signed merely consented to a moving of plaintiffs' root-beer stand from its present location to the tract in question and was not a general consent to a reclassification of the property from residential to commercial. Only one of the persons consenting testified at the hearing and her testimony was of little value. Only one of the plaintiffs testified. He identified the plat showing the classification of the various properties in the general area involved and testified as to the traffic survey made by the State, heretofore mentioned, and gave a general description of the root-beer stand which he proposed to build on the tract if it were rezoned. Six photographs of the intersection and the surrounding area were introduced and admitted in evidence. The foregoing constitutes all of the evidence introduced by the plaintiffs to sustain their position.

In the very recent case of Mahoney v. City of Chicago, 9 Ill. 2d 156, our Supreme Court fully considered and answered the arguments which the plaintiffs make in this case. It appeared in the Mahoney case that appellees owned three adjoining lots located at the southeast corner of Laramie Avenue and Jackson Boulevard and had an opportunity to dispose of them to a purchaser who desired to utilize the site for an undertaking

establishment. These lots, however, were located in a district zoned for apartment use. There was presented the situation where Laramie Avenue was zoned for apartment use on the east side and for business use on the west side. The applicable Chicago zoning ordinance prohibited the operation of an undertaking establishment in an apartment district but permitted their operation in a business district. The appellees contended that the limiting of their property to an apartment use, while designating identical property located on the opposite side of the street for business, was an unreasonable and discriminatory exercise of the police power which bore no relation to the public health, safety, morals or welfare, and which served to deprive them of their property without due process of law. The city denied this. Evidence was heard which bore upon the question of whether the divergent zoning classification on the two sides of Laramie Avenue was reasonable and related to the public good. The circuit court held the ordinance void so far as it applied to the appellees' property on the ground that it effected an arbitrary and illegal classification when it excluded undertaking establishments from apartment districts. On appeal, the Supreme Court said (p. 159): "We find nothing unreasonable in the provisions of the zoning ordinance classifying hotels, hospitals, nursing homes, schools, clubs, libraries, museums and certain other uses as permissible in an apartment district, but permitting funeral homes to be located only in a business district. We consider the matter of locating funeral homes to be within the legislative discretion, and the propriety of such action to be a debatable question for determination by the city council and not by this court. *LaSalle Nat. Bank v. City of Chicago*, 6 Ill. 2d 22."

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The court in the Mahoney case then considered whether the circuit court's finding that the ordinance was unreasonable and void in its application to appellees' property might be sustained on the ground that the city improperly exercised its police power when it zoned the east side of Laramie Avenue for apartment use while zoning the west side for business use. After reciting the substance of the evidence, the court said (p. 161): "Based upon the axiom that zoning must begin and end somewhere, it has become a recognized method of zoning to cause streets to serve as the line of demarcation between higher and lower use districts. (Miller Bros. Lumber Co. v. City of Chicago, 414 Ill. 162; Offner Electronics, Inc. v. Gerhardt, 398 Ill. 266.) With regard to such method it is held that mere proximity to the line of demarcation is, of itself, insufficient to show that the ordinance creating it is invalid or discriminatory as to such property. (Wesemann v. Village of LaGrange Park, 407 Ill. 81.) Here, appellees base their claim of unreasonableness largely upon the circumstance that property across the dividing line has a different classification. On the other hand, Laramie Avenue constitutes a logical physical barrier between the two use districts. If the restrictions on the east side of the street were to be removed as to appellees' property, the business area on the west side would be allowed to expand into the residential area, even though the record shows that such expansion is not necessary. In such a manner the protection afforded to the residential area by making Laramie the line of demarcation would be dissipated and the way opened for further encroachments which, in time, could defeat the purpose of the residential restrictions.* * *

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DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
530 CHICAGO
CHICAGO, ILL. 60637

Taking into consideration the exclusive residential development which the current zoning classification has effected to the east of Laramie, together with the evidence of traffic conditions, we find no firm basis to say that the city acted arbitrarily or unreasonably when it zoned the two sides of the street differently. This view is strengthened by photographic evidence introduced by both parties which shows a remarkable contrast in the appearance and condition of the opposite sides of the street. One side shows a typical business development; the other a typical and desirable residential area. A change of zoning cannot be justified simply because certain individuals want it, but only because the public welfare demands it. (*Dunlap v. City of Woodstock*, 405 Ill. 410.) It has also long been held that the judgment of municipal authorities with reference to zoning is conclusive unless it is shown to be arbitrary, capricious and unrelated to the public good, and where there is room for a legitimate difference of opinion concerning the reasonableness of a particular ordinance the finding of the legislative body will not be disturbed. (*Jacobson v. Village of Wilmette*, 403 Ill. 250.) Under the evidence presented in this record, we think the most that can be said of the question of whether appellees' property should be characterized as business or residential apartment is that it is fairly debatable and is a question to be resolved by the city council and not the courts. (*Of. LaSalle National Bank v. City of Chicago*, 6 Ill. 2d 22.) It is our opinion that appellees have failed to sustain their burden of proving that the ordinance, as it applies to their property, is arbitrary and unreasonable, or unrelated to the public welfare; thus we find no basis to disturb the legislative judgment of the city."

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In the instant case appellants insist that their property would be more valuable if zoned for commercial purposes. This is a proper consideration in determining the validity of a zoning regulation, but it is not controlling. It is only one of the many circumstances to be considered. If the gain to the public is small when compared with the burden imposed upon individual property owners, then there is no valid basis for an exercise of the police power. Here, however, it is shown that the restrictions imposed by such a regulation protect the health, safety and welfare of the public, they must be sustained, even though private interests are to some extent impaired. (Mahoney v. City of Chicago, 9 Ill. 2d 158, 163, and cases there cited.)

In our opinion, appellants have not sustained the burden of showing that the zoning of their property is arbitrary or unreasonable or that it bore no relationship to the public good and the judgment of the Circuit Court of Peoria County should be, and is, affirmed.

J. Conrad
Concurs

Judgment affirmed.

Bovaldi, J. Concurs

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General No. 10963

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D., 1956

12 I.A. 366

IN THE MATTER OF:

STANLEY WAYNE HINTON, ESTHER
ELAINE HINTON, WARREN WAYNE
HINTON, JR.

BLANCHE HINTON,

Petitioner-Appellant.

*correction per
letter from Wunder
Rec. 1/15/57*
Appeal from the
County
Circuit Court of
Ogle County, Illinois.

DOVE, P.J.

Lillian Llewellyn, probation officer of the county court of Ogle County, filed in that court, on June 30, 1955, her verified petition which recited that Stanley Wayne Hinton, Esther Elaine Hinton, and Warren Wayne Hinton, Jr., minors, were in the custody of Blanche Hinton, their mother, who resided at 605 North Court Street in Rockford, Illinois. The petition further alleged that Warren Hinton, residing at Mt. Morris, Illinois, is the father of the children, and that the children are dependent and their parents are unfit and improper guardians and unable to provide proper care or supervision for them. It was then alleged that it is for the interest of the children and the state that they be taken from their parents and placed under the guardianship of some suitable person to be appointed by the court.

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This petition made the children and their father and mother parties-defendant and prayed that upon the hearing the court would decree that the children be taken from their parents and placed under the guardianship of some suitable person to be appointed by the court and that the guardian to be appointed should be authorized to consent to the legal adoption of the children. Upon the filing of the petition, a temporary order was entered by the court authorizing the probation officer to take the children and place them in St. Vincent's Orphanage at Freeport and providing that so long as the children were cared for at that place of detention, Ogle County should pay therefor at the rate of \$40.00 per month per child.

On July 5, 1955, the parents and children appeared in open court and a hearing was had resulting in an order, which was filed and approved on August 5, 1955. This order found that the children were dependent; that the mother was an unfit parent and had abandoned the children and was guilty of extreme and repeated cruelty toward the children; and that the father, Warren Hinton, had consented to the adoption of the children. The court directed that the children be taken from the custody of their natural parents and placed under guardianship and appointed the probation officer of Ogle County, Lillian Llewellyn, guardian of the person of said minors and granted her authority to consent to the adoption of the children. The order further provided that the children would continue in the custody of St. Vincent's Orphanage at Freeport.

From the evidence of the father and mother of the children, both of whom testified at the hearing on July 5, 1955, it appears that the children were five, four and three years of age respectively at the time of this hearing; that prior to February, 1954, appellant, Blanche Hinton, her husband, Warren Hinton, and their three children, who are involved in this appeal, lived together in Ogle County, Illinois; that in February, 1954, they moved from Ogle County, Illinois, to Afton, Wisconsin, where they lived together as a family until February, 1955, when the parents separated. At the time of their separation, the husband took the children and placed them in a boarding home in Beloit, Wisconsin, where the children remained until June, 1955. At that time the mother of the children was living in a room at 605 North Court Street in Rockford, Illinois, and her mother, Dorothy Phelps, was living in Beloit, Wisconsin. Mrs. Phelps was advised that the father of the children was not paying for their care in Beloit and she took the children from the boarding home, where the father had placed them, to her home and kept them there one night. The following morning Mrs. Phelps took the children to her daughter in Rockford, who kept them one night. The next morning Mrs. Hinton, the mother of the children, contacted the probation authorities in Rockford, who, in turn, contacted Lillian Llewellyn, the probation officer of the county court of Ogle County, who initiated this proceeding.

On December 2, 1955, Blanche Hinton, the mother of the children, filed her verified petition in the County Court of Ogle County praying that the decree of August 5, 1955, be vacated and set aside and the children restored to her custody. This petition was heard on December 19, 1955, and an order

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✓ entered denying the prayer thereof. On March 13, 1956, appellant filed her notice of appeal asking that the order of December 19, 1955, be reversed and the order of August 5, 1955, vacated and the cause remanded with instructions to the trial court to enter an order restoring the custody of the children to appellant. On April 6, 1956, the State's Attorney and Lillian Llewellyn filed their motion in the trial court to dismiss the appeal on the ground that the appeal was not perfected within sixty days from the date of the entry of the order appealed from. This motion was heard and allowed and an order entered in the trial court on April 24, 1956, dismissing this appeal. On May 17, 1956, the report of trial proceedings was duly certified by the trial court, but the record on appeal does not show when, if ever, the report of trial proceedings was ever filed in the trial court, but the clerk duly certifies that the record is a true transcript of the proceedings had in the county court. This transcript was filed in this court on May 18, 1956, and briefs of the respective parties filed in accordance with our rules.

Counsel for appellees call our attention to the foregoing facts as disclosed by the record and insist there is nothing properly before this court for review.

✓ The applicable provision of the Civil Practice Act in effect on August 5, 1955, at the time the decree of that day was entered and on December 19, 1955, when the order was entered denying appellant's motion to vacate the order of August 5, 1955, provided that no appeal shall be taken to this court after the expiration of ninety days from the entry of the order or decree complained of. (Ill. Rev. Stat. 1953, chap. 110, sec. 76, par. 1) On July 19, 1955, this section

of the Practice Act was amended, effective January 1, 1956, shortening the time in which an appeal may be taken to sixty days after the entry of the judgment complained of. (Ill. Rev. Stat. 1955, chap. 110, sec. 76, par. 1.)

The order entered on August 5, 1955, was a final order. It found appellant an unfit mother, declared the children dependent, appointed a guardian for their persons and took their custody from their mother and gave the custody to the guardian. More than ninety days thereafter, on December 2, 1955, appellant sought to have that order vacated. When an order denying the vacation of the order of August 5, 1955, was entered on December 19, 1955, the Practice Act had been amended shortening the time in which appeals could be taken to sixty days after the entry of the order, judgment or decree complained of. The time to appeal from the order of August 5, 1955, had elapsed before appellant sought to have that order vacated. The order entered by the trial court on December 19, 1955, became appealable on that day, but no notice of appeal seeking to reverse that order was filed until March 13, 1956, which was more than sixty days after December 19, 1955. When this amendatory act became effective on January 1, 1956, there was nothing pending in the county court. The matter there had gone to final order and there was nothing pending in any court of review challenging that order.

In *City of Chicago v. Industrial Commission*, 292 Ill. 409, it appeared that the circuit court, on June 10, 1919, affirmed an award of the Industrial Commission and the trial court entered an order that the cause was one proper to be reviewed by the Supreme Court. The Supreme Court had held that after the trial court had entered such an order, a writ

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of error could be sued out of the Supreme Court any time within three years after the rendition of the judgment sought to be reviewed. The legislature in 1918 amended the Compensation Act, the amendment going in force on July 1, 1919. By this amendment the judgment of the Industrial Commission could only be reviewed by the Supreme Court upon a writ of error applied for not later than the second day of the first term of the Supreme Court following the rendition of the circuit court judgment sought to be reviewed. In holding that the Supreme Court was without jurisdiction to hear the case inasmuch as the writ of error was brought at the February Term, 1920, instead of at the October Term, 1919, as required after the law was amended, the court said (p. 411): "This court has repeatedly held that the law is well settled that there can be no vested right in any particular remedy, method or procedure, and 'that while the general rule is that statutes will not be so construed as to give them a retrospective operation unless it clearly appears that such was the legislative intention, still, when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether suit had been instituted or not, unless there is a saving clause as to existing litigation.' (Chicago and Western Indiana Railroad Co. v. Guthrie, 192 Ill. 579. To the same effect are Dobbins v. First Nat. Bank, 112 Ill. 553; Winslow v. People, 117 id. 152; People v. Clark, 283 id. 221, and cases cited.) There can be no question, under these authorities, that this amendment merely affected practice and procedure,

and that as there is no vested right in practice and procedure, the writ of error after July 1, 1919, could only be sued out in accordance with the provisions of the statute as amended."

In *Board of Education v. Brittin*, 11 Ill. App. 2d 371, it appeared that Evans W. Brittin and others filed their petition to detach certain described land from the Williamsville Community Unit School District and attach or annex the same to the Elkhart Community High School District. On June 6, 1955, an order was entered by the County Board of School Trustees of Logan County allowing the prayer of the petition, and on June 14, 1955, a copy of that order was served on the county superintendent of schools of Sangamon County. These proceedings were had under the law governing detachment and annexation of school areas in force at that time. (Ill. Rev. Stat., 1953, chap. 122, art. 4B-5) On July 9, 1955, the School Code was amended changing the time for commencing proceedings for review from thirty-five days to ten days after a copy of the decision sought to be reviewed was served by registered mail upon the party affected. (Ill. Rev. Stat. 1955, chap. 122, art. 4B-5) At the same time the applicable provisions of the Administrative Review Act was likewise amended (Ill. Rev. Stat. 1955, chap. 110, sec. 4).

On July 14, 1955, five days after the amendments became effective and thirty days after service of a copy of the order on the superintendent of schools of Sangamon County, the Board of Education of Williamsville Community Unit School District filed its petition in the Circuit Court of Logan County under the Administrative Review Act to review the decision of the County Board of School Trustees of Logan County, entered on June 6, 1955. The petition consisted of two counts.

Count one sought to have the order of June 8, 1955, declared of no force and effect and sought an injunction restraining the defendants from taking any further action in connection therewith. Count two sought a review of the decision of the County Board of School Trustees under the Administrative Review Act. The trial court held that count one did not state a cause of action and that it had no jurisdiction of the subject matter of count two, and, from an order dismissing the complaint, the petitioners appealed. In affirming the judgment of the trial court, the appellate court stated that the amendatory act of July 9, 1955, by express terms, provided that the provisions of the new act should not affect or impair any suits or petitions for review or complaints pertaining thereto pending in any court of record at the time the act took effect; that on July 9, 1955, when the amendatory act became effective, there was nothing pending before any court of record and, therefore, the action of the County Board of School Trustees of Logan County became final and not appealable. The court further stated that the amendment in no sense vested any rights but merely affected practice and procedure and as no appeal was pending or perfected at the time the amendment became effective, the amendment, by limiting the time for appeal to ten days, barred any appeal or review thereafter. The court then concluded: "With the ten days as provided by the new law having expired since notice had been sent out, no review can be permitted under the Administrative Review Act."

✓ In the instant case, under the provisions of the Practice Act in effect on December 19, 1955, appellant could file her notice of appeal and have the order entered that day reviewed any time prior to the expiration of ninety days from

✓ that date. The legislature had, however, just five months before shortened that period to sixty days, effective January 1, 1956. There was no clause continuing the provisions of the former act as to judgments, orders or decrees rendered prior to January 1, 1956. The amendment effective January 1, 1956, merely affected practice and procedure. There was no saving clause. The amendment applied to all pending actions and any further proceedings in those actions. This appeal must, therefore, be dismissed.

Evoldi, J. concurs

*J. Crow
concurs*

Appeal dismissed.

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1956

12 I.A.^{2d} 367

NAOMI LOVEKIN, Administrator of the Estate
of George D. Lovekin, deceased; NAOMI LOVE-
KIN, individually; and DAVID BRUCE LOVE-
KIN, a minor, by NAOMI LOVEKIN, his mother
and next friend,

Plaintiffs-Appellees,

-vs-

Appeal from the

Circuit Court of
Kane County.

FRANCIS P. LOSER and ROBERT W. ALDER,
d/b/a Loser's Tavern, also known as Bob and
Whitey's; RAY J. MYERS, d/b/a Ray's Bar-B-Q;
FRANCIS M. RHY, d/b/a Pop's Cheerio Inn;
BROWNELL KISSSEL, d/b/a Bud's Tavern; WIL-
LIAM J. MURTAGH and ROBERT L. MUR-
TAGH, d/b/s Riverside Inn; J. EARL HU-
TCHESON, d/b/a Johnnie's Lounge; HARRY KON-
TOS, d/b/a Marine Grill; CHESTER MATTI-
SON, d/b/a Aurora Athletic Club; JOSEPHINE
A. FIDLER, d/b/a Fidler's Coconut Inn; RAY-
MOND V. SCHWARTZ, d/b/s O. K. Grill; and
ANDREW WILLIAM GERRY,

Defendants-Appellees.

ANTHONY HOWANIEC, d/b/a Hi-Lite 30 Drive-
In Theatre.

Petitioner-Appellant.

CROW, J.

This is an appeal by Anthony Howaniec, d/b/a Hi-Lite
30 Drive-In Theatre, petitioner-appellant, from an order of February
14, 1956, denying his amended motion and petition to intervene and
join in Count II of the Complaint of Naomi Lovekin and David Love-
kin, plaintiffs-appellees, against various defendants-appellees
who, allegedly, by selling or giving alcoholic liquor caused the

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intoxication, in whole or in part, of one Andrew W. Emery, in consequence of which and by the acts of Andrew W. Emery, the intoxicated person, while he was driving an automobile, August 29, 1953, in a southerly direction on U. S. Route 30, or Joliet Road, near the intersection thereof with Montgomery Road, Township of Aurora, Kane County, George D. Lovekin, husband of Naomi and father of the minor child David Lovekin, who was standing on U. S. Route 30 directing traffic, was struck and killed by the automobile, by reason whereof the plaintiffs Naomi and David Lovekin were injured in their means of support. Count II is based on the Dram Shop Act: CH. 43 ILL. REV. STATS., 1933, par. 135.

The petitioner-appellant's amended motion and petition to intervene and join in Count II alleged, in substance, that George D. Lovekin, the decedent, was at the time of the events referred to in the complaint an employee of the petitioner-appellant; his injuries and death arose out of and in the course of his employment; at the time, the petitioner-appellant, his servants, agents, and employees were in the exercise of due care and did not contribute to the decedent's injuries or death; the petitioner-appellant has paid workmen's compensation of \$5000.00, under an approved lump sum settlement contract to Naomi Lovekin, the widow, and David Lovekin, the minor child, under the Workmen's Compensation Act; and the petitioner-appellant alleged he is entitled, under the Workmen's Compensation Act, to reimbursement of such \$5000.00 Workmen's Compensation payment from any sums paid the plaintiffs Naomi and David Lovekin by any of the defendants in satisfaction of a judgment, or compromise settlement, or otherwise, to join in Count II, and to have any orders affecting his interests in the proceeds of any such satisfaction or compromise settlement. The plaintiffs filed objections to

the amended motion and petition. The amended motion and petition purports to be based on a portion of the Workmen's Compensation Act: CH. 48, ILL. REV. STATS., 1953, par. 138.5.

Count I of the Complaint is by Naomi Lovekin, as administrator of the estate of George D. Lovekin, deceased, plaintiff, against Andrew W. Emery, defendant, and is an allegedly wrongful death suit.

Prior to his present amended motion and petition to intervene and join in Count II, the petitioner-appellant had filed a motion and petition to intervene and join in the action, generally, i.e., as to both Counts I and II, alleging substantially the same things as alleged in his later amended motion and petition except the allegation as to his and his employees' freedom from negligence which is in the amended motion and petition was not in the original motion and petition. The plaintiffs filed objections to that original motion and petition also. From such it appears there is, for present purposes, no controversy about George D. Lovekin's employment by the petitioner-appellant, his injuries and death arising out of and in the course of the employment, and the payment of the workmen's compensation, or as to the petitioner's right to seek reimbursement therefor from any sums paid or to be paid the plaintiffs by the defendant Andrew W. Emery under Count I or to join in Count I. On January 17, 1956 the Court allowed that original motion and petition to intervene as to the cause of action in Count I against the defendant Andrew W. Emery therein, and denied it as to the causes of action in Count II against the various other defendants therein.

The present amended motion and petition to intervene and join in Count II was filed thereafter and the present order denying it was entered thereafter.

Under the provisions of the Workmen's Compensation Act, CH. 48, ILL. REV. STAT., 1953, par. 138.5, where the injury or death for which compensation is payable is not proximately caused by the negligence of the employer or his employees, but is caused under circumstances creating a legal liability for damages on the part of some third party, not the employer, legal proceedings may be taken against the third party notwithstanding the workmen's compensation paid or to be paid; if the action against the third party is by the injured employee or his personal representative and judgment obtained and paid or settlement made there is to be paid the employer therefrom the Workmen's Compensation he's paid or is to pay; if the employee or his personal representative agrees to receive workmen's compensation or accepts anything on account thereof or institutes proceedings to recover such the employer may have a lien on any award, judgment or fund from which the employee may be compensated by the third party; in such actions brought by the employee or his personal representative he must notify the employer, the employer may thereafter join in the action, and no release or settlement or satisfaction of judgment therein is valid without the written consent of the employer and employee or his personal representative; if, under certain circumstances, the employee or his personal representative do not institute a proceeding against the third party, the employer may do so in his name or the employee's or the personal representative's for damages on account of the injury or death of the employee and the employer shall pay the employee or personal representative all sums collected in excess of the workmen's compensation paid or to be paid, costs, fees, and expenses.

In DILLON et al. v. NATHAN et al. (1956) 10 Ill. App. (2)

The following information was obtained from the records of the [redacted] Department of the Interior, Bureau of Land Management, regarding the [redacted] land grant.

[The remainder of the page contains extremely faint, illegible text.]

289, 135 N.E. (2) 136, we have recently held in a situation similar in all material respects to the present case that that part of the Workmen's Compensation Act does not apply to a cause of action against a third party under the Dram Shop Act by a widow and child of a deceased employee for injury in their means of support, and gives the employer of the deceased employee (assuming him and his employees to be not negligent) and his compensation insurer no right to intervene in or join in such Dram Shop Act suit and seek therein to recoup for workmen's compensation paid the widow (or child), no right to be subrogated, and no lien on whatever, if any, judgment may result therein in favor of the plaintiffs widow and child. The Supreme Court denied a petition for leave to appeal in that case September 21, 1956. Our analysis of the statutes, cases, and authorities, and our statement of the reasons and principles by which we are guided in reaching that conclusion are fully set forth in that case and need not again be stated.

We have therein referred, inter alia, to all of the cases cited by the petitioner-appellant here, except these: In Re Estate of Shields, deceased (1943) 320 Ill. App. 522; CITY OF CHICAGO v. FIZEL (1942) 315 Ill. App. 216; GRIGGS v. LEO. ROYER et al. (1915) 271 Ill. 312; BRENNAN CONST. CO. v. BLAIR et al. (1931) 261 Ill. App. 9; SJOBERG v. JOSEPH T. RYERSON & SON INC. et al. (1956) 8 Ill. App. (2) 414; SAMMON v. CHICAGO R. I. and PAS. R. Co. etc. (1954) 2 Ill. App. (2) 191; MCCLURE et al. v. LENCE (1951) 345 Ill. App. 158, and 349 Ill. App. 341. None of these except MCCLURE et al. v. LENCE, had anything to do with a cause of action under the Dram Shop Act, and that case did not involve an employee-employer relationship or the Workmen's Compensation Act, but involved an entirely different

The following information was obtained from the records of the [redacted] Department of the [redacted] State of [redacted].

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consideration and point, not here concerned, as to the legal effect of a release of a third party railroad under the Injuries Act by the administrator of a decedent's estate upon a later suit against another third party under the Train Shop Act. UPHOLP v. IND. BOARD et al. had nothing to do with reimbursement or recoupment by an employer of workmen's compensation payments resulting from a third party's alleged injury of an employee but involved merely whether a particular employer, employee, and injury were or were not under the Workmen's Compensation Act. That case and apparently In Re Estate of Shields, City of Chicago v. Pizel, and Brennan Const. Co. v. Blair et al., are cited merely for the general principles that in construing a statute the intention of the legislature is the law, a thing within the intention is within the statute though not within the letter, and a thing within the letter is not within the statute if not within its intention, and that the Workmen's Compensation Act ought to be "liberally" construed. Such are not determinative of the case at bar nor particularly helpful in ascertaining the intention and meaning of the foregoing part of the Workmen's Compensation Act. Sioberg v. Joseph T. Iverson and Son Inc. and Marion v. Chicago etc. R. R. Co. merely involved various procedural aspects of an employer's intervention in suits by the employee for personal injuries against an allegedly negligent third party where there was no question as to the right of the employer so to intervene.

The order denying the petitioner-appellant's amended motion and petition to intervene and join in Count IV will, therefore, be affirmed.

Dove, J. Concurs

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Convaldi J. Concurs

Dove, J. Concourse

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Gen. No. 10945

Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1956

12 I.A.^{2d} 368

IN RE ESTATE OF FRANCIS L. BROWN,
Deceased,
MACFARLANE L. BROWN,
Petitioner-Appellant,

vs.

RUTH SCHWANKE, Executor under the
Will of Margaret A. Brown, deceased,
Respondent-Appellee.

Appeal from
Circuit Court of
Winnebago County

EOVALDI, --- J.

Francis L. Brown, a former president of the Rockford Life Insurance Company, a resident of Rockford, Illinois died November 6, 1953, survived by his wife, Margaret Brown, and by Macfarlane L. Brown, Forbes Brown, and Margaret Umlandt, his children. Subsequent to his death, the Winnebago County Probate Court admitted to probate a will which was executed on December 2, 1931, by the testator, and Macfarlane L. Brown was named administrator with the

will annexed. Margaret Brown, the wife of decedent, was the principal legatee and devisee under the terms of the 1931 will. She died testate after her husband's death, and her niece, Ruth Schwanke, was appointed executor of her will.

On September 8, 1954, Macfarlane L. Brown filed a petition to admit to probate the contents of an alleged destroyed will executed by Francis L. Brown on April 7, 1945. The petition alleged that the will was illegally destroyed and that this will revoked the former will dated December 2, 1931, and that said last mentioned will had been illegally allowed probate in the above court on December 16, 1953. Upon a hearing in the probate court of Winnebago County, an order was entered denying the prayer of the petition to probate the April 7, 1945 will, and from that order, the petitioner appealed to the circuit court of Winnebago County. The matter was tried de novo in the circuit court upon a stipulation of the parties agreeing to use the same testimony and evidence which was introduced in the hearing in the probate court, and upon additional evidence produced in the circuit court. On January 13, 1956, the circuit court entered an order denying the prayer of the petition. From the order of the circuit court denying the petition to probate the contents of the April 7, 1945, will, this appeal has been prosecuted.

On April 7, 1945 Francis L. Brown executed a will which had been prepared for him by Karl Williams, a Rockford attorney. The petitioner proved the execution of this will

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by competent testimony of the subscribing witnesses to the will. No copy of the 1945 will was produced, and no testimony was given regarding the contents of the 1945 will, except the testimony of Karl Williams who testified that he destroyed the 1945 will at the direction of the testator, but was not certain as to whether or not he destroyed it in the presence of the testator. He testified that he received the following note from testator:

"Rockford Ills.

Sep. 12-1945

Karl Williams, Atty.

Dear Mr. Williams:

I wish to revoke the Will which you drew up for me. This will put the original Will which was drawn up for me by Morris Hinchcliffe in full force and effect.

Respectfully,

Francis L. Brown"

Attorney Williams testified that he did not recall the terms of the 1945 Francis L. Brown will and that he did not know what the terms or provisions of the 1945 will were when it was finally drawn. He produced a sheet of paper which was admitted into evidence as Petitioner's Exhibit 1 which was undated and contained handwritten notations and jottings with regard to the Francis L. Brown will. These notations were as follows:

"FLB will. Everything to wife except stock. She to have voting power and receive divs as long as lives, then divided bet. Miles Brown (grandson) & children of deceased brother Walter Brown then living ~~at B~~ death share & share alike. Power of sale in Mrs. B. as T, proceeds to them.

Also chil of sister Lottie Williams, Barrington."

Williams testified further that he was not sure what the words

"also chil of Lottie Williams, Barrington" applied to, or where they applied, and he stated he could not recall that the jottings in Petitioner's Exhibit No. 1 were ever incorporated into the 1945 Francis L. Brown will, and that he did not know whether or not the jottings went into the will as finally drawn.

It is the contention of the appellant that there was no evidence to the effect that Karl Williams destroyed the 1945 will in the presence of the testator as required by Section 46 (a) of the Probate Act, (Ch. 3, Sec. 46, Par. 197, Ill. Rev. St., 1955) and that the contents of the 1945 will were proven by competent secondary evidence. Appellant further contends that there would be a presumption that a lawyer of Mr. Williams experience would have included in the 1945 will a revocation clause which would have revoked the 1931 will; and that even if this revocation clause were not included, the 1945 will would revoke the 1931 will, since its terms were inconsistent with the terms of the 1931 will.

The rule in Illinois is well established that a will is ambulatory and has no force and effect for any purpose unless and until it is admitted to probate, and that the execution of a subsequent will, even if it contain an express declaration of revocation of the previous will, does not revoke the previous will. This question has been decided by the leading case of Crooker v. McArdle, 332 Ill. 27. In that case, a will executed February 14, 1922, was admitted to probate. Two of the testator's heirs filed a bill to contest

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the 1922 will on the ground that a subsequent will had been executed by the testator, and that the latter will was lost but never revoked. The Supreme Court, at page 29, said: "A will is not effective for any purpose until it is admitted to probate." On page 30, the Court further stated: "No will can be shown to revoke a previous will until the subsequent will has been admitted to probate." Appellant relies on two Illinois cases, *Lasier v. Wright*, 304 Ill. 130, and *In re Campbell's Estate*, 324 Ill. App. 159, holding that a later will, where admitted to probate, revokes a prior inconsistent will. Such holding is not questioned by appellee. However, in the instant case, the contents of the later will were in dispute and the later will was not admitted to probate. The burden of proving the contents of the later will rested upon the petitioner. *Beatty v. Clegg*, 214 Ill. 34, *Griffith v. Higinbotom*, 262 Ill. 126.

The probate court and the circuit court refused to admit the 1945 will to probate. Since the proper execution of the 1945 will was proven, the refusal to probate it by these courts must have been based upon the failure of the petitioner to fulfill the burden of proving the contents of that will. From a careful examination of the record in this case, we are of the opinion that the lower courts acted properly in refusing to admit the 1945 will to probate. The only evidence offered which touched upon the contents of the 1945 will was the testimony of attorney Karl Williams, and he testified that he did

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not know or recall the terms or provisions of the 1945 will. The petitioner did introduce into evidence the office notations made by Karl Williams which are set out in full above. There is no evidence of the relationship which the last part of the notation bears to the previous parts of same in point of time. The author of the notation does not know where the last added words would be inserted, or to what they apply. The meaning and effect of the notation when read as an entirety is left to conjecture and speculation. The witness Williams himself described the notations as "very much scribbled and not in straight lines, even like I had added something to it." He also called attention to the fact that the words "also chil of sister Lottie Williams, Barrington" were written underneath the rest of the jottings and "what that applies to, or where it applies, I am not sure from my notations." He does not attempt to state when in point of time the additions to the notation were made. There is no testimony as to whether the additions were made before or after the execution of the will.

Petitioner having failed to sustain the burden of proving the contents of the 1945 will, the order of the trial court denying the petition to probate same is affirmed.

Dove, F. J. Concur

Order affirmed.

*J. Crow
Concur.*

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THOMAS J. BURRELL,

Appellant,

v.

EVELYN BURRELL,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

12 I.A.^{2d} 71

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Thomas J. Burrell and Evelyn Burrell were married at Chicago on October 30, 1938. They lived and cohabited as husband and wife until March, 1953. Two children were born of the marriage, Thomas now 17 years of age and Wilma now 15 years of age. On March 25, 1953, Thomas J. Burrell filed a complaint for divorce charging her with adultery with Marion Jackson. She denied the charges. She filed a counterclaim for separate maintenance. He denied that she was entitled to separate maintenance. Following a trial a decree was entered on June 28, 1955, finding that the plaintiff had failed to prove the allegations of his complaint by a preponderance of the evidence and dismissing the complaint for want of equity. The decree further found that the counter-plaintiff proved the material allegations of her complaint by a preponderance of the evidence, that she is living separate and apart from her husband without her fault, that he is well able to support her and their children and to pay attorneys' fees and decreed that she is entitled to separate maintenance, that she have the care and custody of the

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children with the right of their father to reasonable visitation, that the master in chancery to whom the case had previously been referred take testimony with respect to the income of the husband and make recommendations as to the amounts to be allowed for the support of the children and for reasonable attorneys' fees. The decree reserved jurisdiction for the purpose of determining the amount of alimony to be paid to the wife for her support, the support of the children and for her attorneys' fees, suit money and costs.

On September 8, 1955, plaintiff appealed from that part of the decree dismissing the complaint for want of equity as well as from that part of the decree finding that his wife is entitled to separate maintenance. On February 8, 1956, pursuant to the agreement of the parties, the court ordered that plaintiff pay to his wife the sum of \$55 a week beginning February 14, 1956, of which \$30 per week was allocated for temporary support of the defendant and \$25 per week for support of the children, pending the disposition of plaintiff's appeal, the question of support thereafter to be taken up on notice of either party and the order of reference to the master to continue in force subject to a hearing upon notice. The defendant moved to dismiss the appeal in case No. 46850 on the ground that there was no final decree. We denied the motion to dismiss that part of the appeal dismissing complainant's complaint for divorce, but dismissed the appeal from that part of the decree finding that the defendant is entitled to separate maintenance. On March 12, 1956, the plaintiff filed his notice of appeal from the decree for separate maintenance of June 28, 1955, "as supplemented

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by the order entered on February 8, 1956, fixing the amount of support for the counterplaintiff" and praying that we reverse the decree for separate maintenance and remand the cause with directions to dismiss the countercomplaint for want of equity, or for a new trial. Plaintiff's motion to dismiss the second appeal (case No. 46918) was reserved to hearing. A decree for separate maintenance is not final until the amount awarded for separate maintenance is determined. See Hunter v. Hunter, 100 Ill. 519; Knowlton v. Knowlton, 40 Ill. App. 588. The order of February 8, 1956, is a temporary order. It retained jurisdiction to determine the amount of separate maintenance; child support, attorneys' fees, suit money and costs. Therefore the motion to dismiss the appeal (case No. 46918) from the separate maintenance decree of June 28, 1955, as supplemented by the order of February 8, 1956, is allowed. The defendant asks us to reconsider the ruling denying the motion to dismiss the appeal from that part of the decree dismissing the complaint for divorce for want of equity. On reconsideration of the matter we have decided to adhere to our previous order.

Plaintiff argues for reversal of the decree on the ground that it is against the manifest weight of the evidence. He testified that his wife told him that she and a friend, Christine Cammack, were going to visit New Orleans, the latter's home town. He said she told him they were going by automobile with Mrs. Cammack's brother-in-law and his wife. When Mrs. Cammack came to plaintiff's house on the

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evening of Friday, March 6, 1953, he recognized her as a woman who used to come into his tavern. He said he told his wife that every time he had seen Christine she was with some other woman's husband. His wife said that since she had been going out with Christine she had not seen "anything wrong," and that plaintiff answered, "Well, if she has proved herself out, all right" and did not object to his wife going with Christine on the trip. Plaintiff testified that Mrs. Cammack told him that they were going to 111th and Throop Streets to pick up the other two people. He became suspicious when he saw Christine. After the car containing defendant and Christine left, plaintiff got in his car and followed them. He lost them at a traffic light. Plaintiff introduced testimony which he asserts proved that his wife and Christine drove in an automobile with Marion Jackson and Allen Furlow to Cairo, Illinois, where they registered at the Parkham Hotel. According to plaintiff's testimony his wife and her three companions arrived at that hotel between 3:00 and 4:00 A.M. on Saturday March 7, 1953, and that defendant and Jackson occupied a bedroom there that night. He introduced further testimony that on March 7, 1953, Jackson and plaintiff's wife and Furlow and Mrs. Cammack registered at the Lumpkin Hotel in Memphis, Tennessee, and that his wife and Jackson occupied a bedroom that night.

Twelve witnesses testified in support of defendant's position. These witnesses included the children of the

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parties, Christine Cammack and her husband, Allen Furlow and Marion Jackson. The testimony of defendant's witnesses was that her husband understood that Christine and she were traveling by railroad; that on Friday evening March 6, 1953, defendant and Christine were driven to the Illinois Central Railroad Station at 63rd Street and Dorchester Avenue, Chicago, where they boarded a coach on a train going south; that the next morning they got off at Memphis, Tennessee, that the defendant then called a relative, Katie Powell; that defendant and Christine went to Mrs. Powell's home in Memphis where they remained until Sunday morning, when the Powells, Christine and defendant attended church services; and that after dinner Christine and defendant resumed their journey by train to New Orleans. The defendant testified that neither she nor Christine left the train until it arrived at Memphis. She denied visiting a hotel in Cairo or Memphis. The porter on the train identified defendant and Mrs. Cammack as two women who got on the train in Chicago and got off the next morning at Memphis. Other witnesses testified to the driving of defendant and Mrs. Cammack to the railroad station, helping them on the train with their baggage and seeing the train depart with defendant and Mrs. Cammack as passengers thereon. Jackson and Furlow testified that on Friday evening, March 6, 1953, they drove directly to Memphis where they registered at the Lumpkin Hotel. They denied that they were accompanied by Christine or defendant and denied stopping at Cairo. Jackson denied

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that he ever had sexual relations with the defendant. Defendant testified that on returning to Chicago from New Orleans she had a conversation by telephone with her husband in which he told her that she had gone to Memphis with Jackson, Christine and Furlow and that she told him that was untrue. She further testified in justification of her failure to return to her home.

The decision in this case depended entirely upon the credibility to be given the witnesses. The chancellor who heard the witnesses testify had an opportunity to observe them and their demeanor, and his determination will not be set aside unless contrary to the manifest weight of the evidence. We have given careful consideration to the testimony and to the reasonable inferences to be drawn therefrom and are convinced that the decree dismissing the complaint for divorce for want of equity is not against the manifest weight of the evidence. Therefore, the decree of the Circuit Court of Cook County dismissing the complaint for divorce for want of equity is affirmed.

DECREE AFFIRMED.

NIEMEYER, P. J., and FRIEND, J., CONCUR.

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CATHERINE GEORGES, also known as
CATHERINE GEORGIAKAKIS,

Appellant,

v.

STEVI GEORGES, also known as
STEVI GEORGIAKAKIS,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

12 I.A.²¹ 471

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

On October 28, 1954, Catherine Rogiokos Georges of Chicago filed a complaint to annul her marriage to Stevi Georges and for a judgment for \$1,000 for moneys advanced. A hearing before the chancellor resulted in a decree dismissing the complaint for want of equity. The plaintiff, appealing asks that the decree be reversed and that the court remand the cause with directions to enter a decree annulling the purported marriage.

The defendant, a native of Greece, was a seaman on a Greek steamship which entered the port of New York on September 26, 1950. He was sick and was hospitalized for 15 days. He came to Chicago the last week of October, 1950. An immigration inspector arrested him in Chicago on March 18, 1953. He was charged with being in the United States in violation of the Immigration Act in that after his admission as a nonimmigrant he failed to comply with the conditions of that status. The warrant of arrest became a registration. He did not enter this country as a student. He was given permission to remain from time to time because he was a student. He attended the Wells High School, where

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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3. $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$ (the probability of getting heads on both coins is $\frac{1}{4}$).

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he graduated. Thereafter he took a course for about a year in an electrical school. He continued to attend school until after the immigration hearing. On July 23, 1953, he was granted "voluntary departure" by the immigration service. On August 14, 1953, he was given until October 20, 1953 to depart from the United States. Subsequently, he was given until January 21, 1954, to depart. Within this time limitation he returned to Greece. The defendant testified that he registered with the immigration authorities every year.

On a Sunday in the latter part of November, 1953, the defendant requested the pastor of the Greek Orthodox Church which he attended to introduce him to a young lady as he intended to get married. Plaintiff's father was at the church that Sunday. The priest introduced defendant to plaintiff's father. The defendant called on the plaintiff and after a brief courtship they became engaged to marry. Both parties are members of the Greek Orthodox Church. She knew that he was an alien and would have to return to Greece. The parties agreed to be married in the "City Hall" because there was not enough time for a church wedding. On December 19, 1953, the parties were married in a civil ceremony. The record is silent as to cohabitation between the time of the marriage ceremony and the time he departed for Greece.

While the defendant was in Greece there was correspondence between the parties. She sent him about \$1,000. Because he was married to an American citizen he "got an

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the quota" for immigration and came back to the United States. A witness employed by the Immigration Service testified that in the situation then existing, under the "regular quota law" the defendant "might" have to wait 10, 15 or 20 years to be admitted into this country. Because of the marriage to plaintiff he was permitted to re-enter the United States on July 25, 1954. Pursuant to a call from New York, she forwarded to him the sum of \$130 for the purpose of having his car repaired. The car had been stored in New York while he was out of the country. He then drove to Chicago and called on her. Defendant testified that he lived with his wife the last days of August and the beginning of September, 1954, not over night, but for a few hours, altogether three or four times. He said they had sexual intercourse. The plaintiff introduced testimony of a physician to the effect that there had been no act of intercourse. There was competent evidence to support the chancellor's finding that the marriage was not consummated.

The plaintiff testified that after her husband's return from Greece there were arguments at her father's house. She said that he stated that they would not have any children and that he said "I don't want any connections with anybody. I don't want any friends. I don't want any group around us and I don't want your father and mother." She also testified that he said that they would not have an apartment, that they would live in one room and that he wanted her "to be working." She became nervous and upset

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and entered a hospital, where she remained a week. When she came out of the hospital she found that her parents had told him "to leave the house because of the way matters had gone." She testified that thereafter she and her husband visited the priest at their church and arranged for the celebration of their marriage in the church on October 10 at 5:00 P.M. The wedding invitations were printed and she arranged for her bridesmaids. Her husband was working on a night shift. She communicated with him by telephone. She stated that he did not cooperate in procuring a best man, ushers and witnesses. She said that because of her husband's attitude she called the pastor of her church and told him that the wedding would not take place.

Defendant testified that at the time they were married he had a ticket to return to Greece and that he informed her that he had to return. He testified further that she did not request that a religious ceremony be performed at the time he asked her to marry him, that he went to the church to talk to the priest and said he wanted to be married in the church, but that she said she wanted to be married in the City Hall. He stated that the reason they did not marry in the church was that he had to leave the country before the time required for a church wedding. He said he took her to the immigration office but does not recall whether before or after the marriage. He said that when he came back from Greece he went to his wife at her house and stayed there about two

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weeks, that he loves his wife and is willing to take her back and live with her. He denied that he told her that they would not have children and denied that he refused to carry out the religious ceremony set for October 10, 1954. He said his wife called up and stopped the wedding and that she did not tell him why she was calling off the wedding. Plaintiff testified that the first time she found out that her husband "married her just to come back" was when she conferred with her lawyer in October, 1954. She admitted that 30 days prior to the date set for the church wedding she wrote her husband that she was "terribly in love with him."

Plaintiff asserts that defendant, an alien illegally in this country, had no real intention of entering into a valid marriage with her, but entered into the marriage solely for the purpose of remaining in the United States and that his conduct in so doing is such a fraud that it goes to the very essence of the marriage relation, affording grounds for an annulment of the marriage. She says that the defendant did not have matrimonial intentions at the time the civil ceremony was performed. The facts in the cases cited by plaintiff in support of her contention established that the husband entered into marriage for the sole purpose of securing a preferred quota status in entering this country, and that he did not wish to live with his wife. In these cases the evidence clearly showed that he fraudulently induced his wife to marry him when he did not love her and did not have any intention of cohabiting with her as his wife. In the instant case plaintiff knew that defendant was a Greek alien. She is

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presumed to have knowledge of the immigration laws. At the time she met him he was registered as an alien. He was a student although he ~~did~~ not come into the country under that classification. She corresponded with him while he was in Greece. When he was permitted to again re-enter the country he sought to live with her. He was ordered from her house by her parents. Thereafter the couple arranged for a church wedding. He testified that he loves her and wishes to live with her as his wife. She testified that at the time they arranged for a church wedding she was in love with him. The court found that the defendant did not enter into the marriage for the sole purpose of providing him with a basis for remaining in the United States. It is interesting to note that the verified complaint alleges that the defendant represented to the plaintiff that he was an alien, that his permit to remain in the United States would shortly expire, and that his intention was to marry the plaintiff and return to Greece, following which he would make immediate application for re-entry into the United States "without the necessity of delay due to the fact that he would then be married to the plaintiff, an American citizen." The record sustains the finding of the chancellor that no fraud was committed by defendant in inducing the plaintiff to marry him.

Plaintiff maintains that defendant induced her to enter into the marriage by his sole promise that a religious ceremony in accordance with the parties' belief would follow, and that his failure and refusal to go through with a religious marriage ceremony afforded grounds for annulment of the

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marriage. The civil ceremony constituted a valid marriage. Following his return from Greece the parties went to the pastor of their church and arranged for a religious ceremony. Plaintiff states that this ceremony was called off because of his reluctant attitude. He testified that he was willing to have the religious ceremony performed. We cannot say that the finding of the court on this question was against the manifest weight of the evidence. In her brief plaintiff asks that the defendant be required to repay to her the moneys advanced to him "while she thought a normal matrimonial state was in existence, awaiting only a religious ceremony." She concedes that the money sent to defendant was a gift and not a loan. The defendant cannot be compelled to return the gift.

For the foregoing reasons the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

NIEMEYER, P. J., and FRIEND, J., CONCUR.

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46915

C. VERNON THOMPSON,

Appellee,

v.

WILLIAM P. TAYLOR,

Appellant.

APPEAL FROM

SUPERIOR COURT

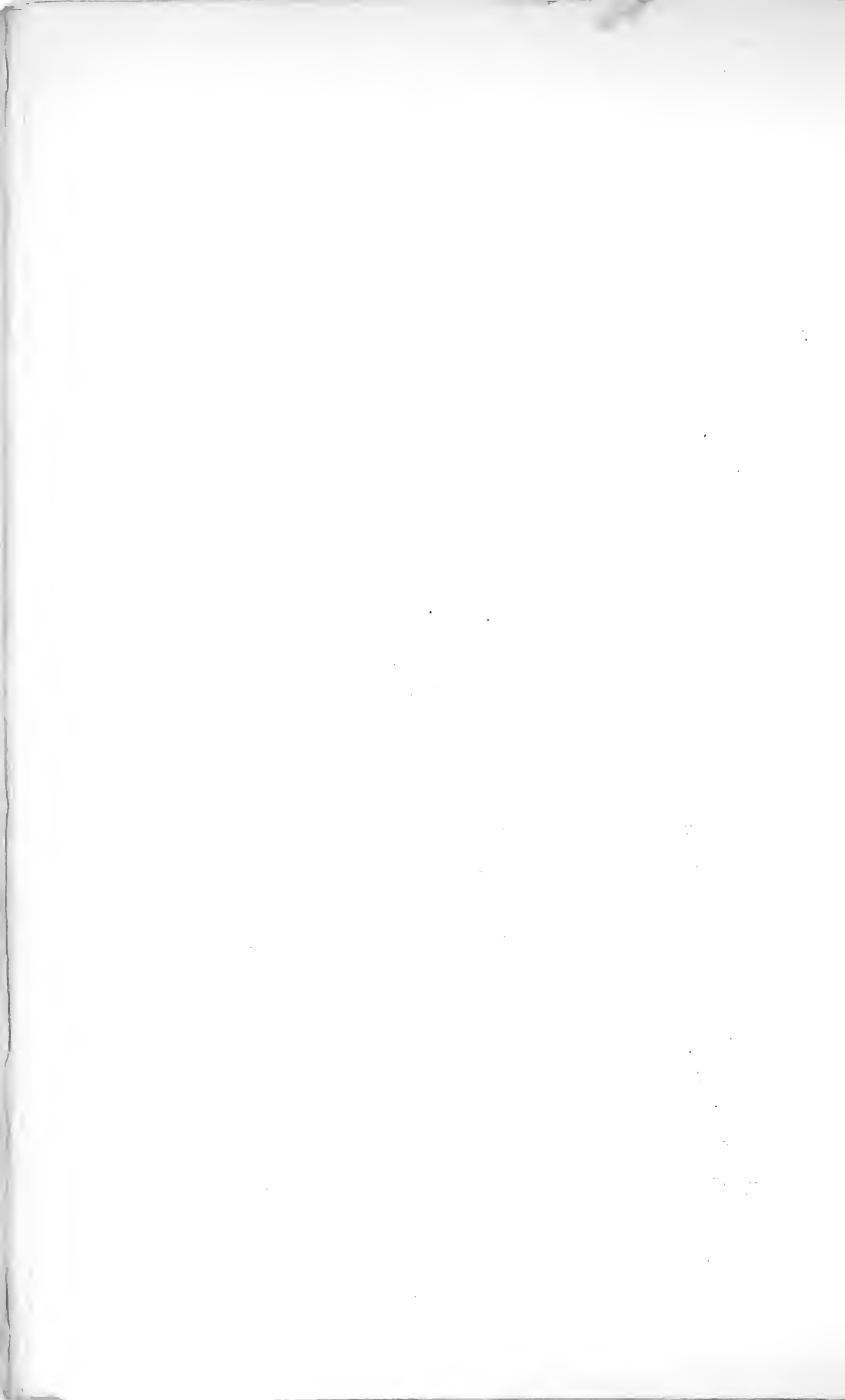
COOK COUNTY

12 I.A.^{2d} 472

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

C. Vernon Thompson, a lawyer, admitted to practice in Illinois and California, sued William P. Taylor for attorney's fees on a quantum meruit basis. There was a contingent fee written agreement between the parties. Plaintiff testified that this agreement was later modified by an oral agreement. The defendant denied that plaintiff was discharged. A trial without a jury resulted in a judgment in favor of plaintiff for \$24,000. This amount was arrived at by stipulation of value of the services should the plaintiff prevail and undisputed proof as to the time necessarily expended. Defendant appealed.

On August 27, 1953, the defendant employed plaintiff as his attorney to prosecute by suit or otherwise all matters arising out of the passing of defendant's father, including the attack on a will left by him, and in consideration of the services rendered and to be rendered agreed to pay plaintiff 40% of any amount recovered. It was further agreed that no fee would be charged in the event of no recovery. Out-of-pocket expenses were to be borne by the defendant. The father of defendant, and his wife Isabelle, also known as Rose Dawn,



lived in Texas. On August 3, 1953, they made what purported to be a reciprocal will. The will cut off the defendant with a bequest of \$1.00. The defendant's father died on August 14, 1953. His widow, the stepmother of the defendant, filed a suit in the County Court of Bexar County, Texas, to probate the instrument. The defendant contested the probate of the will. The will was admitted to probate and defendant appealed to the District Court. There the case was tried before a jury which returned a verdict finding that the instrument was the result of undue influence exerted upon defendant's father by his wife. The proponent's motion for judgment notwithstanding the verdict was sustained and judgment was entered admitting the instrument to probate. On appeal by the defendant to the Court of Civil Appeals the judgment of the District Court was affirmed. A petition for leave to appeal to the Supreme Court of Texas was denied.

On October 14, 1953, with the consent of the defendant, a San Antonio lawyer, Leonard Brown, was employed to represent the defendant. On May 6, 1954, Brown wrote a letter to the plaintiff stating that he was withdrawing from the case and canceling his agreement for a percentage of whatever should be recovered. He withdrew because he was of the opinion that his client had only a "long shot legal question" and that for several years he had "refused employment in any long shot cases." He recommended another San Antonio attorney named Sam Dotson. The case was tried before a jury in May, 1954, and judgment was entered on July 28, 1954.



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The record was filed in the Court of Civil Appeals on December 10, 1954.

Plaintiff testified that on Saturday, January 8, 1955, in a conversation in his office in Chicago with the defendant and the latter's wife he accused the defendant of settling the case behind his back. The defendant and his wife denied having done so. Plaintiff further testified that in that conversation he asked the Taylors for \$500 additional expense money to go to San Antonio to work on the brief due in the Court of Civil Appeals shortly and that Mrs. Taylor said they would have the money by the following Monday. The defendants did not supply the money to plaintiff. Plaintiff testified about a letter dated February 9, 1955, from the defendant to the latter's attorney in Texas, reading:

"For your information and guidance, Mr. E. Vernon Thompson renounced all agreements extant between Mr. Thompson and myself as of January 8, 1955. Such action by Mr. Thompson constitutes withdrawal from said agreements. At your earliest convenience, please obtain and send to me an accurate, correct inventory of my father's estate. After I have received the inventory, I will outline a procedure that will terminate the need for further litigation."

A copy of the letter was sent to plaintiff's Chicago office. He testified further that in October, 1953, there was an oral agreement modifying the original written employment agreement from 40% to 50% of the amount recovered after deducting expenses. The defendant and his wife testified that they never made a settlement with anyone. Defendant testified that he never discharged plaintiff and that in a conversation on January 8, 1955, in answer to plaintiff's



request for \$500 for expenses he said that he and his wife would think it over and get in touch with plaintiff. Thereafter neither plaintiff nor defendant got in touch with the other. Defendant further testified that he felt that plaintiff had withdrawn from the case because plaintiff had stated he would not work under the old agreement.

Plaintiff introduced a letter dated April 7, 1955, written by plaintiff to defendant reading:

"Herewith by special messenger, copy of appellee's brief filed April 5th, 1955, which arrived a few moments ago. This matter is scheduled presently for oral argument on the 13th day of April, 1955 in the Court of Appeals. Due to the fact that the writer has been discharged as your attorney in this matter he is not authorized to appear in your behalf."

Both parties are in agreement on the proposition that an attorney under a contingent fee contract who is discharged without fault on his part is entitled to reasonable compensation for services rendered to the date of discharge. The record in the case at bar does not show that the plaintiff was discharged. The statement in plaintiff's letter of April 7, 1955, that he had been discharged is not supported by the testimony. Plaintiff received a copy of defendant's letter of February 9, 1955, addressed to the latter's Texas attorney stating that plaintiff had withdrawn from the case. No evidence was introduced to support plaintiff's statement that the case had been settled. Plaintiff did not withdraw his name from the brief in the Court of Civil Appeals. He did not make any

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request for \$500 for expenses he said that he and his wife would think it over and get in touch with plaintiff. Thereafter neither plaintiff nor defendant got in touch with the other. Defendant further testified that he felt that plaintiff had withdrawn from the case because plaintiff had stated he would not work under the old agreement.

Plaintiff introduced a letter dated April 7, 1955, written by plaintiff to defendant reading:

"Herewith by special messenger, copy of appellee's brief filed April 5th, 1955 which arrived a few moments ago. This matter is scheduled presently for oral argument on the 13th day of April, 1955 in the Court of Appeals. Due to the fact that the writer has been discharged as your attorney in this matter he is not authorized to appear in your behalf."

Both parties are in ~~the~~ agreement on the proposition that an attorney under a contingent fee contract who is discharged without fault on his part is entitled to reasonable compensation for services rendered to the date of discharge. The record in the case at bar does not show that the plaintiff was discharged. The statement in plaintiff's letter of April 7, 1955, that he had been discharged is not supported by the testimony. (Although) plaintiff received a copy of defendant's letter of February 9, 1955, addressed to the latter's Texas attorney stating that plaintiff had withdrawn from the case, he did not communicate with either defendant or Texas counsel until April 7, 1955. No evidence was introduced to support plaintiff's statement that the case had been settled. Plaintiff did not withdraw his name from the brief in the Court of Civil Appeals. He did not make any



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attempt to ascertain whether there had been a settlement. He did not contact the defendant to verify his alleged discharge. He did not take the stand to rebut the denials of defendant and his wife of his alleged discharge. We are satisfied that plaintiff failed to prove that he had been discharged.

Therefore the judgment of the Superior Court of Cook County is reversed and the cause is remanded with directions to enter judgment for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P. J., and FRIEND, J., CONCUR.



46855

MARY B. DOORNBOS,
Appellee,

v.

GEORGE DOORNBOS,
Appellee.

On Appeal of
PEOPLE OF THE STATE OF
ILLINOIS, Intervener,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

12 I.A. 2d 473

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

On September 20, 1954 the plaintiff, Mary B. Doornbos, filed a complaint for divorce charging defendant, her husband, George Doornbos, with habitual drunkenness. She alleged that they were married in 1946, that a child, David G. J. Doornbos, then five years old, was born "during the period of this marriage," that they lived together as husband and wife until immediately preceding the filing of the complaint, and she asked that she be awarded the sole custody of the minor child "born to the parties thereto," and that defendant be required to pay alimony, child support and costs, including attorney's fees.

October 1, 1954 defendant filed his answer denying that he was guilty of habitual drunkenness, and averring that plaintiff left the home of the parties without cause or justification and that she was not entitled to the relief sought.

On October 20, 1954, while the suit was pending, plaintiff filed a petition for declaratory judgment alleging that the minor child, David, was born to her as the result

The first part of the report is devoted to a description of the
 methods used in the investigation. The second part contains the
 results of the experiments. The third part is a discussion of the
 results. The fourth part is a conclusion. The fifth part is a
 list of references. The sixth part is a list of figures. The
 seventh part is a list of tables. The eighth part is a list of
 appendices. The ninth part is a list of footnotes. The tenth
 part is a list of errata. The eleventh part is a list of
 acknowledgments. The twelfth part is a list of dedications.
 The thirteenth part is a list of prefaces. The fourteenth
 part is a list of forewords. The fifteenth part is a list of
 introductions. The sixteenth part is a list of chapters. The
 seventeenth part is a list of sections. The eighteenth part is
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 twenty-first part is a list of words. The twenty-second part
 is a list of letters. The twenty-third part is a list of
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 twenty-fifth part is a list of abbreviations. The twenty-sixth
 part is a list of acronyms. The twenty-seventh part is a list
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 auxiliaries. The forty-ninth part is a list of
 copulas. The fiftieth part is a list of
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of artificial insemination in June 1948; that the injection was done by a reputable physician; that the donor was not the defendant; that she loved children, had always wanted a child of her own, that her husband was sterile, and that by reason of that condition he at no time objected to the artificial insemination; that defendant had no right, claim or interest in the child since he was not in fact its father; and that the child was at no time legally adopted. She stated further that artificial insemination is now a common practise in the United States, that annually thousands of infants are conceived in that manner, that consequently the practise is not contrary to public policy and good morals, and that the act of permitting the insemination by a donor other than the husband does not constitute adultery; and she asked that a declaratory decree be entered to that effect.

In his answer to the petition for a declaratory judgment defendant averred in substance that artificial insemination is contrary to the moral and the natural law and therefore illegal; that because of the strong presumption in law that a child born of a married woman is the child of her husband, if he is alive at the time of conception and could have had access to her, he should be declared to be the father of the child.

The chancellor, on December 13, 1954, after first hearing evidence on the petition for declaratory judgment, the answer and reply thereto, made the following findings:

"1. Heterologous Artificial Insemination (when the specimen of semen used is obtained from a third party or donor) with or without the consent of husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore illegitimate. As such it is the child of the mother and the father has no right or interest in said child.

"2. Homologous Artificial Insemination (when the specimen of semen used is obtained from the husband of the woman), is not contrary to public policy and good morals, and does not present any difficulty from the legal point of view."

After the entry of the declaratory judgment, the matter of the divorce came on for hearing upon the stipulation of the parties that it be heard "as in default matters," and in an ex parte hearing a decree was entered on January 21, 1955 granting plaintiff a divorce on the ground of habitual drunkenness. The decree awarded to plaintiff the absolute care and custody of the minor child who, it found, was born to plaintiff through artificial insemination; relieved defendant of all obligation to support the child; ordered plaintiff to pay certain bills, adjudicated the property rights of the parties; and foreclosed the parties from any and all claims of alimony, dower, homestead, court costs and attorneys' fees.

Thereafter, on February 16, 1955, the state's attorney for Cook County filed a petition and was granted



leave to intervene. On the same date he presented a motion "to vacate the Decree of Divorce entered herein on January 21, 1955 or so much of said Decree as affects the legitimacy of David G. J. Doornbos," alleging the following grounds:

"1. That the Court was without jurisdiction to enter a decree finding the child was the child of the mother only and hold that the father was not liable for the support of said child presently or in the future.

"2. That Section 4 of Chapter 40 of the Divorce Act [Ill. Rev. Stat. 1955, Ch. 40, Par. 4, Sec. 3] says:

'Legitimacy of Children. §3. No divorce shall, in anywise, affect the legitimacy of the children of such marriage, except in cases where the marriage shall be declared void on the grounds of a prior marriage.'

and that said decree is contrary to said statute.

"3. That the pleadings in this cause by Mary B. Doornbos, Plaintiff, and George Doornbos, Defendant, and the evidence in support of said pleadings have not sustained the proof to overcome the presumption that David G. J. Doornbos born while the parties, Mary B. Doornbos and George Doornbos were married and living together is not the legitimate child of said parties.

"4. That the verified pleadings of Mary B. Doornbos and George Doornbos and the evidence adduced in support thereof tend to show that the defendant, George Doornbos, had access to Mary B. Doornbos, plaintiff, at the time that she became pregnant with the child now known as

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David G. J. Doornbos.

"5. That the decree of the Court that said George Doornbos is not the father of David G. J. Doornbos is not supported by the pleadings and the proof submitted in this cause."

The motion was denied June 2, 1955.

On August 29, 1955 the state's attorney filed the following notice of appeal:

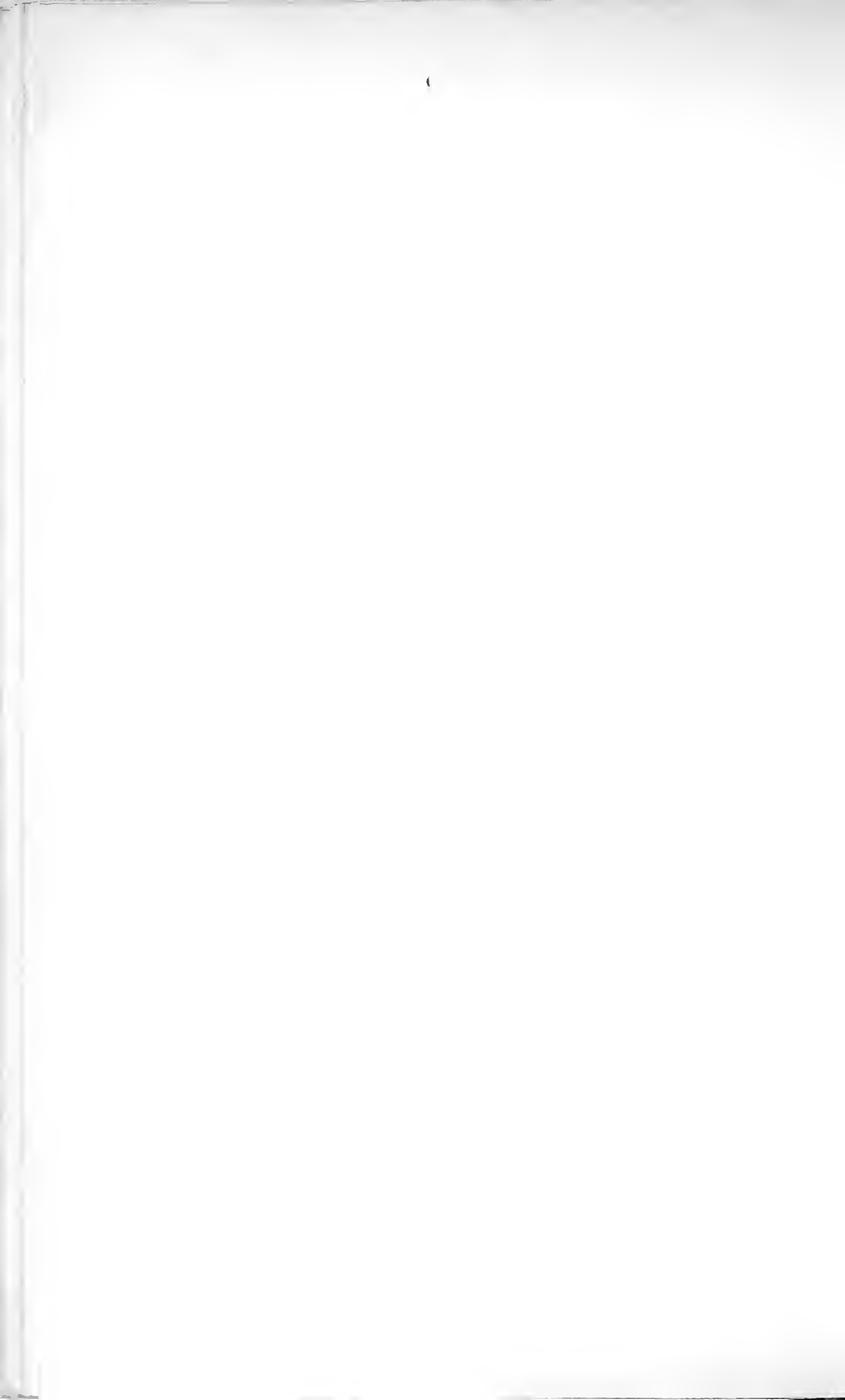
"John Gutknecht, State's Attorney of Cook County, Illinois, in behalf of the People of the State of Illinois, hereby appeals to the Appellate Court of Illinois, First District, from the final Order of the Superior Court of Cook County entered June 2, 1955, denying the petition of the State's Attorney of Cook County, Illinois, to vacate or modify the decree of divorce herein entered so far as it relates to the legitimacy of David G. J. Doornbos, a minor child.

"Petitioner-Appellant prays that said final Order be reversed and that the cause be remanded to the Superior Court of Cook County with directions to modify its decree in accordance with the petition."

Upon the state of the record, it appears that the state's attorney appealed, not from the declaratory judgment, but, rather, from the denial of his motion to vacate or modify the decree of divorce so far as it related to the legitimacy of David G. J. Doornbos, a minor child. In his brief, the state's attorney reviewed the evidence



adduced upon the hearing on the petition for a declaratory judgment which included evidence of defendant's physician as to defendant's sterility, as well as of a reputable practicing obstetrician and gynecologist as to the heterogeneous insemination of plaintiff, and also testimony of another specialist in obstetrics and gynecology with respect to the common practise of artificial insemination. In the light of this evidence, the state's attorney argued that a child born to the parties of a valid marriage is presumed in law to be legitimate, notwithstanding the physician's testimony as to defendant's sterility, where it appeared that he could have had access to his wife during the probable period of conception. Although he does not appeal from the declaratory judgment, the state's attorney directs his attack against that judgment, taking the position that it was not supported by the evidence since a child born in wedlock is presumed legitimate except upon the grounds (1) that the husband is impotent, (2) that he did not or could not have had intercourse with his wife, or (3) when laws of nature conclusively rebut this presumption; and he cites and relies upon section 3 (paragraph 4) of the Divorce Act which provides that "no divorce shall, in anywise, affect the legitimacy of the children of such marriage, except in cases where the marriage shall be declared void upon the grounds of a prior marriage." If the state's attorney had filed an appeal from the entry of the declaratory judgment, pursuant to which all this evidence was adduced, we should have properly had before us for



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decision the question whether the declaratory judgment was contrary to the manifest weight of the evidence, as he contends; but since he appealed only from the decree of divorce which is silent as to the legitimacy of the minor child, and not from the declaratory judgment wherein the question of legitimacy was determined, neither the evidence adduced upon the hearing on the application for the declaratory judgment nor the validity of that judgment is properly before us on appeal. Accordingly, we are of opinion that the court correctly refused to vacate or modify the decree of divorce in conformance with the state's attorney's motion. In any event, the minor child was not represented in the proceedings, no guardian ad litem was appointed to intercede in his behalf, and therefore he is not bound by the adverse judgment.

The question whether the state's attorney has the right to intervene and appeal in this proceeding is not raised by the parties and therefore is not decided.

For the reasons indicated the appeal is dismissed.

Appeal dismissed.

Niemeyer, P. J., and Burke, J., concur.



21
46824

PEOPLE OF THE STATE OF ILLINOIS,)

Appellee,)

v.)

ANGELO TARRANTO and PEERLESS
CASUALTY COMPANY,)

Appellants.)

APPEAL FROM

CRIMINAL COURT,

COOK COUNTY

12 I.A.^{2d} 473

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

In July 1950 the People of the State of Illinois, on relation of Angelo Tarranto, presented in the Criminal Court of Cook County a petition for a writ of habeas corpus in which the sheriff was named defendant; the writ issued as prayed. The petition alleged that relator was being imprisoned by the sheriff in the county jail under color of the authority of the Constitution of the United States relating to the return of fugitives from justice; that his imprisonment was illegal and in violation of his constitutional rights; and that he was being held pursuant to a complaint filed in the Municipal Court of Chicago in which bail was set at \$100,000.00. On motion of relator his bond was reduced to and fixed at \$15,000.00, in which amount he executed a bail bond with Peerless Casualty Company as surety.

Subsequently, in November 1950, the governor of Illinois caused to be issued a warrant for the apprehension and rendition of relator to the agent of the governor of the State of New York, to be taken to that state. In January 1951, one of the judges then presiding in the



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Criminal Court, after inquiring into the cause of relator's detention, ordered that the petition for writ of habeas corpus be quashed, whereupon relator was remanded into the custody of the sheriff to be delivered to the agent from the State of New York. Thereafter, on motion of relator, the remanding order was stayed until March 12, 1951. In January 1951 he filed a notice of appeal to the Supreme Court of Illinois from the final order quashing the petition and remanding him to the custody of the sheriff. Simultaneously, the court on its own motion ordered that the \$15,000.00 bond "is to Stand as STAY BOND in the above entitled cause." The Supreme Court affirmed the order of the Criminal Court quashing the writ and remanding the relator to the sheriff's custody. Subsequent to the service of notice of appeal to the Supreme Court, the time for filing the report of proceedings was extended to April 12, 1951, and the stay bond was likewise extended to that date. April 2, 1951 the time for filing the report of proceedings was extended to May 11, 1951, and the stay bond was likewise further extended to that date. Subsequently the order remanding relator to the custody of the sheriff for rendition to the State of New York was again stayed and continued to May 31, 1951, and the time for filing the bill of exceptions was continued to that date. On May 29, 1952 the state's attorney for Cook County filed in said proceeding the order of the Illinois Supreme Court staying the mandate for a period of ninety days from May 19, 1952. On October 30, 1952 the state's attorney of Cook County again appeared in the Criminal Court to present and



-3-

file the order of the Supreme Court affirming the Criminal Court order from which the appeal was prosecuted, and it was then ordered that the people's writ of capias issue against the relator, returnable forthwith. December 5, 1952, on motion of relator, the remanding order was again stayed until further order of the court. No further order of court was ever entered in the cause terminating the stay of the remanding order or reinstating the cause in the trial court.

Following these proceedings, in September 1954 a petition was filed in the Criminal Court for bond forfeiture alleging generally that "defendant failed to appear before the Court as per the terms of this recognizance." February 3, 1955, counsel for the surety entered and filed a motion for a bill of particulars, asserting that the petition for bond forfeiture was defective in that it failed to state the time and place, when and where, the relator failed to appear before the court, as per the terms of the recognizance therein mentioned. The motion was denied, and the petition for bond forfeiture was never amended so as to show the date, time or place when the relator failed to appear according to the conditions of the bond. In its answer to the petition and in opposition to the motion for bond forfeiture, the surety denied that relator had at any time failed to appear according to the conditions of his bond. No evidence was adduced on the hearing of the motion for forfeiture of the bond. The trial judge evidently took the position that the



record justified him in declaring the bond forfeited.

As we review the proceedings of record, the principal in said recognizance, Angelo Tarranto, was not required to be present in court on March 30, 1955, and the surety was without authority of law to produce or surrender him on that date, because on December 5, 1952 it had been ordered by the Criminal Court that the remanding order be stayed until further order of court, and no order was subsequently entered by the court terminating the stay of relator. Notwithstanding these circumstances, the court, on June 30, 1955, entered a judgment against Tarranto and his surety for \$15,000.00 and costs, from which the surety appeals.

As grounds for reversal it is first urged that where the principal on a bond in a habeas corpus proceeding submits to the jurisdiction of the court, and upon final hearing an order is entered quashing the writ and remanding relator to the custody of the sheriff, the surety is discharged. The bond involved was given in the habeas corpus proceeding, pursuant to the provisions of "An Act to revise the law in relation to habeas corpus," approved March 2, 1874, as amended (Ill. Rev. Stat. 1955, ch. 65), and the Constitution of the State of Illinois relating to habeas corpus proceedings. The condition of the bond was as follows: "that if the above bounden Angelo Tarranto shall personally be and appear before the Criminal Court of Cook County, holden in the City of Chicago in said County, on the 22 day of August, A. D.



1950, and from day to day thereafter until discharged by order of said Court, then and there to answer unto the People of the State of Illinois, upon said Writ of Habeas Corpus and shall abide the order of said Court and not depart the same without leave, then this Recognizance shall be void, otherwise the same shall remain in full force and virtue." This was a civil proceeding and not one to punish relator for crime. Accordingly, the Illinois statute providing for the staying of the mittimus and the continuing of the recognizance in force, "whenever any defendant has been convicted of any criminal offense, which under the law is bailable" (Ill. Rev. Stat. 1955, ch. 38, sec. 780), is inapplicable. People v. Murray, 357 Ill. 326. Counsel cite no authorities authorizing a stay bond or an order of court in a civil action at law that "same Bond is to Stand as STAY BOND" after a final judgment.

However, there are decisions in this state in analogous civil proceedings in which the rights and liberties of persons admitted to bail pending final hearing are considered. These cases generally hold that when the principal submits himself to the jurisdiction of the court and a final order is entered, the surety is discharged. Consult People for use, etc. v. Hathaway, 206 Ill. 42, wherein numerous decisions from this and other states are reviewed. It is not disputed that relator submitted himself to the jurisdiction of the court and fulfilled the condition of the bond by appearing as required until



the final hearing. When the writ was quashed and relator was remanded to the custody of the sheriff, we think the surety was discharged, and the bond could not validly be ordered forfeited more than four years after the final order was entered.

It is further urged that in a habeas corpus proceeding where relator has been admitted to bail pending final hearing, at which an order is entered by the court quashing the writ and ordering relator remanded to the custody of the sheriff, and immediately after the entry of said order a notice of appeal to the Supreme Court of Illinois is filed in the trial court showing proper service, the trial court is without jurisdiction to order the bail bond "to Stand as STAY BOND." The contract evidenced by the bail bond here involved was for the appearance of relator in the habeas corpus proceeding. He appeared in the proceeding without any default and continuously submitted himself to the jurisdiction of the court until final order was entered quashing the writ and remanding him to the custody of the sheriff. An appeal was then taken to the Supreme Court. Until that time the obligation of the surety on the bond was fully performed and discharged, and thereafter the court had no jurisdiction to enter the order "the same Bond ... to Stand as STAY BOND."

In view of our conclusions on the two principal questions involved, we consider it necessary to discuss other points raised by the surety. Accordingly, and for the reasons indicated, the judgment of the Criminal Court is reversed.

JUDGMENT REVERSED.



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46947

In the Matter of the Estate of
REUBEN JOSEPH THIKOLL, also
known as Joseph Reuben, Deceased,

RHEA REUBEN,

Appellee,

v.

EDWIN M. KATZ,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

12 T.A. 474

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Reuben Joseph Thikoll, also known as Joseph Reuben, died on July 1, 1954, leaving him surviving a daughter Bayla Thikoll, born of the marriage to his first wife from whom he was divorced, and Rhea Reuben, whom he subsequently married. Bayla Thikoll charged that Rhea Reuben was not the widow of decedent inasmuch as she married Joseph Reuben on March 21, 1953, three days prior to the entry of a decree of divorce from his previous wife on March 24, 1953. Rhea Reuben retained Edwin M. Katz, the respondent, to establish her rights to share in the estate and agreed to pay him one-third of any recovery made by him from the estate. Katz succeeded in having the date of the divorce decree entered nunc pro tunc as of March 20, 1953, thus validating the marriage of Rhea Reuben to decedent. Bayla Thikoll filed an appeal from the nunc pro tunc order entered in the divorce proceeding, but ultimately a settlement was reached between the parties, evidenced by a written agreement which provided, in part, that Rhea Reuben would receive 21 per cent of the net estate of the decedent. The contingent-fee contract was spread of record in the Probate Court, and a copy thereof

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1. *Journal of the American Medical Association*, 1990; 263: 1033-1036.

1. *Phragmites* spp. *Phragmites australis* (Cav.) Trin. ex Steud.

22.

1. *Introduction*

1. *Phragmites australis* (Cav.) Trin. ex Steud.

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J. Polym. Sci.: Part A: Polym. Chem.

Keywords: child abuse; child sexual abuse; child protection; child welfare

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was also served upon the administrator. When the estate was ready to be closed the administrator petitioned the court for instructions with respect to the payment of the fee alleged to be due Katz on the contingent-fee contract. Rhea Reuben opposed the payment on the grounds that the contract was unconscionable and excessive, and that the lien could not be asserted against the estate. No adjudication was made of the merits of the controversy, the Circuit Court, on appeal, taking the view that the Probate Court had no jurisdiction to adjudicate the matter in issue, which is the sole question to be determined on appeal.

Respondent takes the position that he is entitled to receive from the administrator one-third of the distributive share due Rhea Reuben from the estate because (a) his contract with her constitutes an equitable assignment to him of one-third thereof, and (b) he has a statutory lien for his fees. He occupies a unique position in the administration of the estate--as attorney for the administrator and also for Rhea Reuben, one of the heirs and a claimant under the estate. However, since he is not an heir nor a direct claimant, the matter in controversy is not a dispute between heirs and other claimants in the ordinary sense, but a conflict between an heir, Rhea Reuben, and a claimant against her, based on a contract for legal services.

By the terms of the agreement between respondent and Rhea Reuben she was to receive immediately \$4500.00 in the nature of a widow's award which was to be charged against her distributive share of the estate. Respondent insisted on receiving one-third of the amount, or \$1500.00, and was

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paid that sum, leaving \$3000.00 for the widow. Subsequently the respondent and the administrator petitioned the court to fix a fee for the administrator and his attorney; a total allowance of \$12,000.00 was asked. Rhea Reuben was then represented by other counsel who prevailed upon the court to reduce the fee to \$9500.00, which was allowed; respondent received one-half of this, or \$4750.00. Parenthetically, before the administrator was appointed, an office associate of respondent was acting as administrator to collect for a short period of time, and received \$700.00 for his services. All told, respondent had at this point received a total of \$6250.00 prior to his request to be paid one-third of the final distributive share of Rhea Reuben, and if he had prevailed he would have received an additional \$3396.63, or fees in a total amount of \$9846.63, whereas the widow would have received only \$9793.28.

It is conceded that the Probate Court has jurisdiction to adjudicate all matters involving the administration of an estate including disputes between heirs. However, it does not have jurisdiction to resolve controversies between an heir and an outside party who merely has a claim against that heir unless the claim has special characteristics which bring it within the court's jurisdiction. Respondent contends that the Attorney's Lien Act (Ill. Rev. Stat. 1955, ch. 13, par. 14, sec. 2) and the so-called equitable assignment of Rhea Reuben bring his claim within the jurisdiction of the Probate Court.

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Figure 1. The effect of the concentration of the H_2O_2 solution on the amount of the released H_2O from the H_2O_2 -loaded hydrogel. The amount of the released H_2O was measured by the weight difference of the hydrogel before and after the release. The concentration of the H_2O_2 solution was 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, and 1.0 wt. %.

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The statute upon which he relies reads as follows:

"That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action. Provided, however, such attorneys shall serve notice in writing, which service may be made by registered mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action, and such lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the aforesaid notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation." (Emphasis ours)

The essential element of an attorney's lien or an action based thereon is the recovery achieved by an attorney on behalf of his client. Accordingly, the basic question

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is whether there was any recovery of money or property to which an attorney's lien could attach. We think no such recovery was had in the instant case. The service rendered personally to Rhea Reuben by respondent was in having an order entered in the Circuit Court declaring the divorce decree theretofore entered on March 24, 1953 to be entered nunc pro tunc as of March 20, 1953 so as to validate the decedent's marriage to Rhea Reuben. Although no money was recovered in that proceeding, it is conceded that the legal effect of the entry of that order was to establish Rhea Reuben as the widow of the decedent. We think the Attorney's Lien Act does not authorize a lien merely by virtue of the employment or by virtue of favorable results; there must be a recovery which follows within the framework of the statute. Respondent takes the position that the establishment of Rhea Reuben as the widow and the settlement whereby she was to receive 21 per cent of the net estate constitute such a recovery. Rhea Reuben actually was the widow of the deceased, and the sums she received and will receive from the estate are less than a widow would normally receive. The legal services rendered by Katz did not go beyond the defense of her position as the widow against the claim made by Bayla Thikoll.

A similar situation arose in Grossberg v. Knight, 266 Ill. App. 183, wherein certain heirs claimed that money in a bank account which they alleged belonged to the estate of the deceased had not been inventoried by the executor, and they brought proceedings to compel him to



inventory such property. His counsel contended that the property was not an asset of the estate but a survivorship account belonging to the children of the deceased--the executor and his sister. His attorneys prevailed and subsequently filed a petition for an attorney's lien against the sister of the executor--he had died in the interim--asserting that by successfully defending against the claim made by other heirs the legal effect was the same as recovery of money by their client. In deciding this question the Appellate Court said: "We think it clear in the instant case that the defendant, even if it be assumed she was a client of the petitioning attorneys, did not place in the attorneys' hands any claims, demands or causes of action for suit or collection. The most that can be said under the above assumption is that she retained the attorneys to defend a claim made against her by the heirs in the probate and circuit courts; and we are further of the opinion that when the attorneys defeated the claim it cannot be said that they 'recovered' any 'property or money' for the defendant. The statute gives the attorneys a lien 'to any money or property . . . recovered, on account of such suits, claims, demands or causes of action.' We think it obvious there was no recovery within the meaning of the statute in the instant case." The facts in the Grossberg case are parallel to those in the instant proceeding inasmuch as Rhea Reuben did not recover directly any money as a result of the action brought by Katz in the Circuit Court in the divorce proceeding but merely established her existing

rights. To like effect see Thoresen v. Thoresen, 293 Ill. App. 168. The contingent-fee contract signed by Rhea Reuben merely sets forth her status as that of a recognized heir to an estate rather than as a "claimant" in the ordinary sense. The language used in the contingent-fee contract, namely, "services rendered . . . with reference to the probate of this estate and with reference to doing any and all acts necessary to insure . . . my legal rights in the Estate," presupposes that respondent's services were to consist of helping to establish existing rights and to help in defending the claims of others, and in the recovery of any property or money for the widow to which she was entitled by law.

Respondent relies principally on his contention that the contingent-fee contract signed by Rhea Reuben amounted to an equitable assignment in his favor. In determining whether an equitable assignment exists the language of the instrument relied on is of paramount importance; it is primarily a matter of contractual intent. In the instant proceeding the only agreement with respect to fees contained in the instrument is as follows: "I hereby agree to pay unto my attorney a sum equal to 33-1/3% (one-third) of any and all amounts that I may receive from this estate by way of statutory allowances, legacies, grants, etc. I have no funds at the present time and will pay this arrangement of attorney's fees as funds are received by me through the estate." This amounts to no more than a bare promise to pay respondent "a sum equal to" one-third of the amounts

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received; and payment is to be made "as funds are received." There are no words of appropriation or assignment--nothing more than a personal obligation on the part of Rhea Reuben to pay the fee.

In Story v. Hull, 143 Ill. 506, it was held that ". . . in the absence of an express contract out of which an equitable assignment arises, an attorney at law has no lien for his compensation upon the judgment or decree rendered in a suit prosecuted by him, or upon the real estate, moneys, fund or other property recovered by means of his exertions and labors." In the case of Bromwell v. Turner, 37 Ill. App. 561, the contract provided that the client would pay the attorney's fees ^{from} the money recovered in the litigation. The court held that no lien or assignment was created, and that the contract constituted no more than a promise to pay out of a certain fund. See also Cameron v. Boeger, 200 Ill. 84, which is in point and wherein the court held that the contract was a personal agreement on the part of a cemetery association and its president to pay fees, the amount of which was to be determined by the amount recovered. The principles enunciated in the foregoing decisions have been followed in later Illinois cases: Bell & Howell Co. v. Spoor, 225 Ill. App. 256, which involved the assignment of patent rights; Hibernian Banking Assn. v. Davis, 295 Ill. 537, which considered the assignment of real estate or funds derived from the sale thereof for payment of promissory notes; Daviess v. Harding (Abst.), 316

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Ill. App. 160, which had to do with brokers' fees; and Gulliano v. Supreme Forest Woodman Circle, 304 Ill. App. 582, which examined the alleged assignment of proceeds of insurance policies. Other jurisdictions, as well, have adopted this rule; see 6 C.J.S. Assignments §59, where such cases are footnoted and where it is said that "a mere agreement to pay out of a particular fund, however clear in terms, will not operate as an equitable assignment of the whole or any part of such fund, such an agreement being a mere promise, and not sufficient to transfer control over the fund."

In view of the foregoing conclusion, other points urged by petitioner-appellee need not be discussed. For the reasons indicated, we are of opinion that the order of the Circuit Court was proper, and it is therefore affirmed.

ORDER AFFIRMED.

NIEMEYER, P. J., and BURKE, J., CONCUR.

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46921

IN THE MATTER OF THE ESTATE OF
ERNST UHLICH, JR., Deceased,

APPEAL FROM

HELEN L. KOCH and ALICE R. LANGENBACH,
Objectors,

Appellants,

CIRCUIT COURT,
COOK COUNTY.

V.

WILLIAM C. DOEPP, Administrator.

Appellee.

12 LA 473

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Helen L. Koch and Alice R. Langenbach appeal from an order of the Circuit Court approving the final account of William C. Doepp, administrator of the estate of Ernst Uhlich, Jr., deceased, in which fees were allowed to the firm of Kinne and Scovel, as counsel for the administrator, in the amount of \$20,000.00. The account, as filed in the Probate Court, claimed an allowance for attorneys' fees in that amount. Objections were filed thereto by the appealing parties, two of the heirs. The Probate Court fixed the attorneys' fees at \$14,000.00, whereupon the administrator appealed to the Circuit Court. The nature and extent of the services rendered by the administrator's attorneys and the reasonableness of the fees allowed are the only issues involved in this appeal.

Ernst Uhlich, Jr., died April 8, 1948, leaving an estate of approximately \$300,000.00. Dr. William C. Doepp acted as administrator of the estate, and the firm of Kinne and Scovel as the administrator's counsel. In the probating

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are determined by the laws of the theory of the structure of the atom. This is a circular argument, but it is the only way to proceed.

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of the estate, the usual services were performed by the attorneys, and, in addition, it is claimed that special services were required and rendered since the decedent, during the last four years of his life, had neglected his affairs. His mail had not been opened for four years--mail which included numerous checks, both for his account and for the accounts of many relatives for whom he acted as agent. The record includes other types of mail as well, and a set of books which had been brought down only to 1944. Some of the dividend checks found in decedent's office were in his name, although the stocks and bonds in connection with which they were paid were not his property. It was necessary for the attorneys to examine and pass judgment on files and documents which dated back to 1885 and which were distributed between decedent's office in Chicago and a large storage barn on his property in Blue Island, Illinois. Counsel spent many hours correlating the miscellaneous files which had accrued during the last four years of decedent's life when he had neglected his financial affairs. Countless conferences were held with the heirs, and considerable correspondence was had with them in an attempt to determine what belonged to the estate and what belonged to the various heirs. The decedent failed to file income-tax returns for the four years prior to his death, thus necessitating the preparation of these returns by counsel. Condemnation suits were brought, and special fees incurred for handling these matters. Much time was devoted to going over the decedent's records, and settling

his accounts and income-tax matters.

Both Harry C. Kinne, Sr., and Harry C. Kinne, Jr., kept diaries of their services, but one of the diaries of Harry C. Kinne, Jr., was lost on a train. Harry C. Kinne, Sr., offered to produce all the firm's diaries, **except** the lost one, but the appealing parties did not avail themselves of his offer. Harry C. Kinne, Sr., testified that his services were reasonably valued at thirty dollars an hour, and those of his son at twenty-five dollars an hour. Like testimony was given by Harry C. Kinne, Jr., upon the hearing. He further stated that he devoted 600 hours to probating the estate, 400 in 1948; these 400 hours had been entered in the diary which was subsequently lost; the remaining 200 hours were entered in other diaries. Kinne, Sr., testified that he spent 182 1/2 hours in connection with the estate, 136 1/2 in 1948. Sherman Canty, an associate, devoted eight to ten hours to the estate; his services, like those of the younger Kinne, were valued at twenty-five dollars an hour. The appellee called as a witness on his behalf George L. Haggard who specializes in probate law, trust matters and wills for Kirkland, Fleming, Green, Martin and Ellis, a Chicago law firm. He testified that \$20,000.00 was a reasonable fee. At the conclusion of the hearing the trial judge stated that he was going to allow the fee to be computed on the basis of twenty-five dollars an hour and made a specific finding that the firm of Kinne and Scovel had actually spent 800 hours in the administration of the estate, breaking down the number of hours spent, respectively, by the individuals who

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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testified, and disregarding some twenty hours devoted to defendants' objections to the final report. There was no countervailing proof.

The appealing parties concede that in cases involving factual matters the Appellate Court will not disturb the findings of a trial judge who saw and heard the witnesses unless the finding is manifestly against the weight of the evidence, but they take the position that cases involving the reasonableness of attorneys' fees are in a different category because the reviewing judges may exercise their own judgment, based upon their experience and familiarity with what constitutes reasonable fees for legal work. From the evidence adduced upon the hearing, indicating the conditions that existed at the time of Uhlich's death, it is evident that the services required of the attorneys were of an extraordinary nature, and we think the evidence adduced as to the nature, extent and value of these services is fairly reflected in the judge's finding. Accordingly, the judgment of the Circuit Court is affirmed.

It is urged by appellee that the appeal was vexatious and unfounded, and that costs and attorneys' fees should be assessed against plaintiffs. This request is denied.

JUDGMENT OF THE CIRCUIT COURT
AFFIRMED.

APPELLEE'S REQUEST THAT ~~COSTS~~
ATTORNEYS' FEES BE ASSESSED AGAINST
PLAINTIFFS, DENIED.

NIEMEYER, P. J., and BURKE, J., CONCUR.

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46925

LEWIS C. BROWN,

Appellee,

v.

MOTOR CARGO INC., a corporation,
and ALBERT E. RODGERS,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

12 I.A.^{2d} 476

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF
THE COURT.

Defendants, Motor Cargo Inc., and Albert E. Rodgers,
its driver, appeal from a judgment in an action for injuries
sustained by the plaintiff in a collision between the
motortruck of defendant company and the automobile of
plaintiff at or near the intersection of U. S. Route 30
and Lexington Avenue in the Village of East Chicago Heights,
claiming that plaintiff was guilty of contributory negligence
as a matter of law in entering upon Route 30, a preferential
highway, from an inferior road before it was safe to do so;
that plaintiff failed as a matter of law to establish any
negligence on the part of the defendants which proximately
caused plaintiff's injuries and damages; and that the verdict
was based upon prejudice and passion because the trial court,
over objection of defendants, permitted the jury to see certain
photographs which served no useful purpose in "illuminating
the issues" but which misled, inflamed and prejudiced the
jury. No question is raised as to the amount of the judgment,
the instructions to the jury and the rulings on evidence.

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except as to the photographs.

The collision occurred on February 3, 1951, about 3 o'clock a.m. The truck of defendant company driven by defendant Rodgers was enroute from Minneapolis, Minnesota to the east with a load of butter and eggs and was traveling, according to the driver, 40 to 45 miles an hour, or around 55 or more miles per hour according to the testimony of Leo Urban, a cab driver traveling immediately behind the truck and intending to turn to the right, or south, at Lexington Avenue. Route 30 is a 4-lane highway, reduced to two lanes by snow on the outer edges of the highway and in the center of the pavement. From a point at least 15 feet south of the pavement there is an unobstructed view of Route 30 for a distance estimated from 400 to 600 feet to the brow of a hill from which the route descends to Lexington Avenue. Plaintiff testified that he was driving a 1935 Buick and had taken a man whom he had met in a restaurant in Hammond, Indiana to a point about the middle of the block on Lexington Avenue, immediately south of Route 30; that he returned to Route 30, stopped before reaching the edge of the pavement, looked to the west and to the east, started his car and again looked to the west and, seeing nothing, entered on the pavement in second gear, turned to the right and proceeded about ten feet when he heard a bump, saw a flash of light and became unconscious.

The defendant driver testified that when about 25 feet from the intersection of Lexington Avenue he saw plaintiff's car

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with the lights on, going as fast or faster than the driver was; that plaintiff did not stop, and the defendant driver swerved to the left, applied his brakes and collided with plaintiff's car right at the intersection, his right front wheel striking plaintiff's left front corner; that the collision broke the right front spindle and airline on his motor, rendering the brakes useless; that he crossed Route 30 diagonally and stopped after crashing into a liquor store on the north side of the highway. Urban testified that the collision occurred just east of Lexington Avenue. Plaintiff's car was forced off the highway to the right.

The law applicable to the case is settled. In determining as a matter of law questions of negligence of a plaintiff or defendant on motion by defendant for a directed verdict or for judgment non obstante veredicto, the evidence must be construed most favorably to the plaintiff. Hughes v. Bandy, 404 Ill. 74. Evidence contradicting testimony favoring plaintiff must be disregarded. Osborn v. Leuffgen, 381 Ill. 295. The court can only reject testimony that is inherently improbable. Mannen v. Norris, 338 Ill. 322. In this case there is a direct conflict in the evidence as to whether or not the plaintiff stopped before entering upon the pavement of Route 30; a conflict as to whether the truck was traveling 40 to 45 miles per hour--within the speed limit, or traveling 55 or more miles per hour. Defendants contend that the lights on the truck made it visible when it reached the crest of the hill, and plaintiff therefore cannot be heard to say that he looked before entering the intersection and did

not see the truck. Thomas v. Buchanan, 357 Ill. 270.

Plaintiff argues that at the highest rate of speed shown by the evidence the truck would travel the 400 feet from the crest of the hill to the intersection in five seconds, more or less, and in as much as the collision occurred ten or more feet east of Lexington Avenue it became a question of fact for the jury as to whether or not plaintiff could and should have seen the truck had he looked before he entered on the pavement of Route 30. Under the circumstances we cannot say as a matter of law that plaintiff was guilty of contributory negligence or that he failed to prove negligence on the part of defendant.

Several photographs showing the battered condition of the liquor store in which defendants' truck came to a stop were received in evidence over defendants' objection that the damage to the truck and building was not in issue and that the exhibits were totally irrelevant to any issues in the case and were prejudicial. The distance traveled by the truck after the accident and the force and violence with which it came in contact with the liquor store was evidence tending to show the speed of the truck. On oral argument defendants objected to the number of photographs offered and received. While one photograph would have been ample for the legitimate purpose for which the photographs were offered, this objection was not made on the trial, and had it been made we could not say that the receiving of all the photographs was an abuse of discretion on the part of

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the trial judge and so prejudicial as to demand a reversal of the case.

The judgment is affirmed.

AFFIRMED.

BURKE AND FRIEND, JJ., CONCUR.



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46928

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| THE PEOPLE OF THE STATE OF |) | |
| ILLINOIS, |) | APPEAL FROM |
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| Appellant, |) | |
| |) | MUNICIPAL COURT |
| v. |) | |
| |) | |
| MELVIN BROWN, |) | OF CHICAGO |
| |) | |
| Appellee. |) | 12 I.A. ^{2d} 476 |

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION
OF THE COURT.

The People of the State of Illinois, hereinafter called plaintiff, appeals from an order entered on a petition in the nature of a writ of error coram nobis vacating a judgment of conviction of the defendant of an assault with a deadly weapon and sentencing him to the House of Correction for a term of one year and granting a new trial. The defendant has not appeared in this court.

In his petition defendant alleges his arrest on September 5, 1955 at or about 10:55 p. m., and his trial and conviction on September 7, 1955. He further alleges that on September 6, 1955 at about 11:30 p. m., he was permitted to telephone his mother, informing her of his arrest and imprisonment; that because of the limited time between this telephone call and his trial he was unable to obtain the advice or representation of counsel and was forced to trial without the benefit of legal counsel. There is no allegation of any defense to the charge of assault with a deadly weapon. The trial court, without expressly overruling plaintiff's motion to dismiss the petition, granted a new trial on January 6, 1956, denied defendant's motion

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for a continuance and, on defendant's plea of guilty, found him guilty and released him on probation for the period of one year, on condition that the defendant serve "1st two months in House of Correction."

On the termination of the first trial defendant was immediately committed to the House of Correction. Since on the granting of a new trial defendant pleads guilty to the charge, the petition in the nature of a writ of error coram nobis was evidently used as a means to procure probation. This is an improper use of the petition. The petition is wholly defective. As heretofore stated, it fails to allege any facts showing a defense to the charge upon which petitioner was convicted. Furthermore, it alleges no facts unknown to the trial court at the time judgment was rendered. The trial court necessarily knew that defendant was not represented by counsel, and the court was not required to name counsel for him or to grant a continuance to enable him to employ counsel without request for such action by defendant. Guth v. People, 402 Ill. 286; People v. Reese, 410 Ill. 11.

The order vacating the judgment of September 7, 1955 and the subsequent judgment of conviction entered January 6, 1956 is reversed.

REVERSED.

BURVE AND FRIEND, JJ., CONCUR.

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app. Ch. 18.

46978

EUSIBIUS J. BIGGS,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

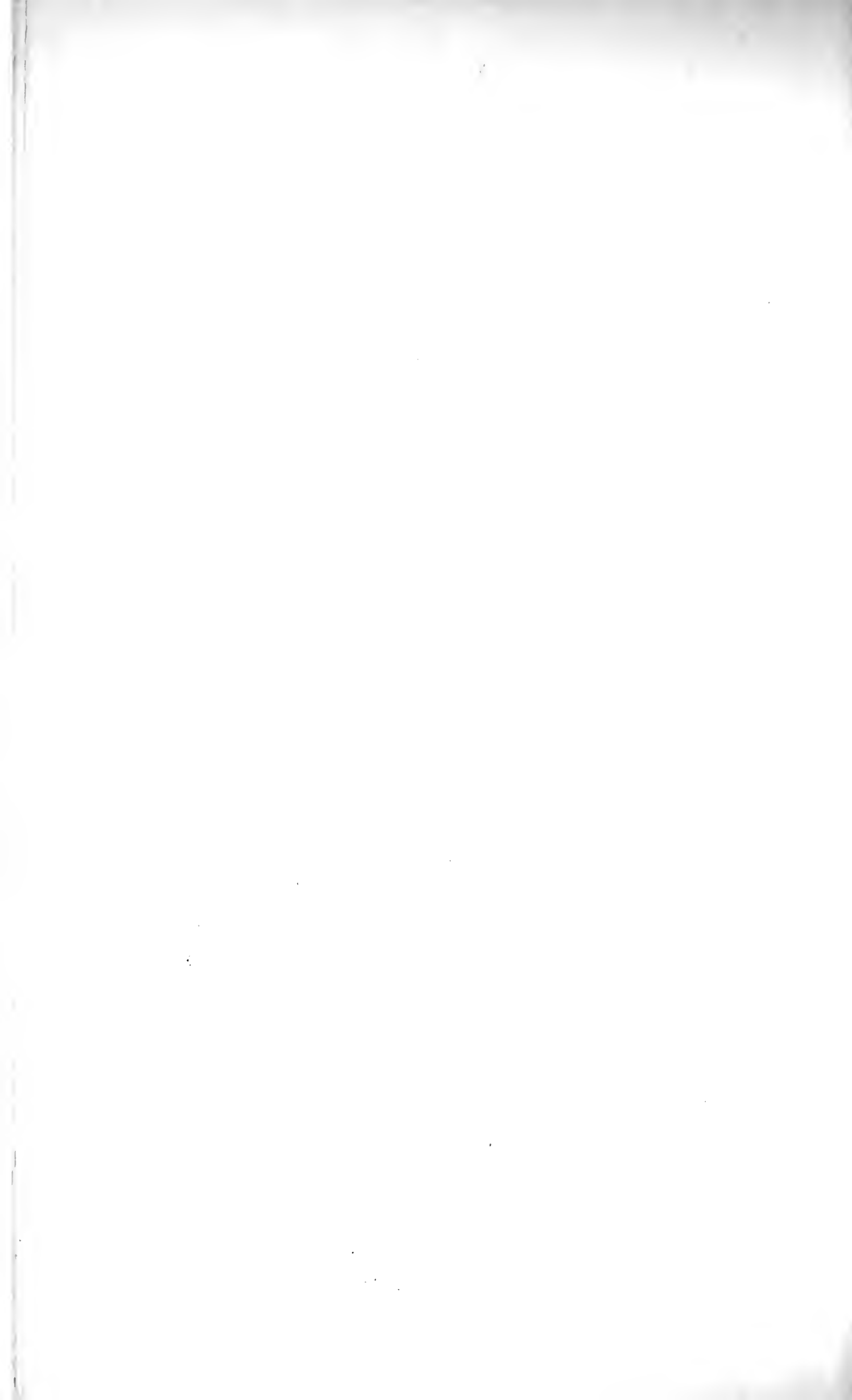
COOK COUNTY

12 I.A.^{2d} 377

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF
THE COURT.

The defendant, City of Chicago, appeals from a permanent injunction restraining it, its officers, agents and employees "from stopping any work for plumbing done by the plaintiff or his employees, in accordance with a permit obtained from the State of Illinois or from the City of Chicago for alleged violation or violations of any ordinance, provision or any rules relating to plumbing or plumbing construction or necessarily incidental to plumbing unless or until the defendant, City of Chicago, a Municipal Corporation, its officers, agents or employees first obtain an order from this court."

The plaintiff, a layman, appears pro se. His complaints---original, amended and supplemental, are unusually prolix and contain much irrelevant and immaterial matter. However, the purpose of plaintiff is plain. By this action he sought to restrain the defendant, its officers, agents and employees, from interfering with his operations as a plumbing contractor, even though he lacked a plumber's license and a permit to do a specific



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job and had failed to file the bond required by the city ordinance, and, in doing the plumbing work, had refused to comply with the provisions of the plumbing ordinance and the rules of defendant, which he considered unreasonable, uncertain, unnecessary and therefore void. Pending the litigation he procured the required plumber's license and a permit to do the specific job on which he was working, and filed a bond, under the ordinance, after the court had deleted provisions held to be illegal. Defendant does not question this action of the court. The record shows no ruling of the court that the provisions of the ordinance and the rules of defendant, of which plaintiff complains, are invalid. Nevertheless, the injunction above mentioned was granted.

Defendant contends that the injunction granted is too broad, that it is uncertain, and that by it the court attempts to direct and control the daily operations of the defendant in supervising and controlling the installation of plumbing within the city. These contentions, particularly the latter, must be sustained. In the case of Public Service Co. of Northern Illinois v. Lynch, 242 Ill. App. 28, an order restraining the highway commissioner of the Town of Proviso, in Cook county, from "interfering in any manner whatsoever, until the further order of the court," with complainant's "electric transmission line ***, " was reversed. The court said (p. 36):

"It is apparent from the form of the decree that the chancellor felt that some authority should rest somewhere to enable the public to regain the use of that part of the highway occupied by complainant's poles, at some future time if conditions should change. This imposes upon the defendant, a duly elected public officer, charged with the duty of preventing and removing obstructions in the highway, the burden of requiring him to apply to the court for permission to perform his duty, whenever the public need requires that complainant's poles shall be removed or their position changed. Defendant, and his successors in office, having statutory duties to perform, should not be placed in the position of being obliged to ask the court's permission to perform their duty."

In the later case of Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, where an injunction was denied restraining the police department from arresting plaintiff's taxicab drivers, the court said (p.479):

"As a general rule it may be said that equity concerns itself only with property rights and will not intervene for the purpose of restraining the enforcement of a criminal statute. This is true even though the acts of the police department may be performed in an oppressive and unlawful way. (32 Corpus Juris, Injunctions, sec. 411, and cases cited.) Such is the rule, also, as to ordinances regulatory in their nature which provide a penalty for violation. (32 id. sec. 411.) This rule has been recognized in this State in the case of City of Chicago v. Wright, 69 Ill. 318, where the court in its opinion said: '*** The court of chancery is conversant only with questions of property and the maintenance of civil rights. It has no jurisdiction to interfere to aid a party in the violation of a public law, to overrule the policy of the State, or interfere with the public duties of any of the departments of government.'"

In the instant case the injunction issued would require an application to the court by defendant before



-4-

it could act in the enforcement of its ordinances or rules relating to "plumbing and plumbing construction, or necessarily incidental to plumbing," in any plumbing work done by plaintiff under a permit. In effect this would constitute superintendence by the court of the daily performance of the duties of the plumbing inspectors and other persons charged with the enforcement of these ordinances and rules. The court erred in granting the injunction.

The order is reversed.

REVERSED.

BURKE and FRIEND, JJ., CONCUR.

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leave
abstract of record
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46959

VIRGINIA DROBINA, Administrator
of the Estate of FRANK GARCZYNSKI,
Deceased,

Appellant,

v.

JAN BUJAK and JOZEFA BUJAK,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

12 I.A.^{2d} 478

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF
THE COURT.

Plaintiff, as administrator of the estate of
Frank Garczynski, deceased, appeals from a summary judgment
dismissing the scire facias proceeding brought by her
to revive a judgment rendered in favor of the deceased.

The judgment which plaintiff seeks to revive
was entered June 5, 1934 in favor of deceased and against
John Bujak and Jozefa Bujak for \$1,894.57. The scire facias
proceeding was instituted April 29, 1954. John Bujak died
October 12, 1952. Service was had on Jozefa Bujak. On May
17, 1955 the Appellate court of this district (2nd Division)
held in Smith v. Carlson, 6 Ill. App.2d 271, that the
institution of the scire facias proceeding did not toll
the statute of limitations and that the actual revival
of the judgment must be accomplished within 20 years. May
27, 1955 defendant filed a motion for summary judgment,
alleging that, 20 years having elapsed from the date
of the entry of the judgment, the statute of limitations
barred any further prosecution of the scire facias
proceeding, and that because of the death of her co-defend-
ant, John Bujak, the proceeding must necessarily fail. The

-2-

motion was sustained and judgment entered dismissing the proceeding. By judgment which became final March 19, 1956 (Vol. 8 Ill.2d 74) the Supreme court reversed the foregoing decision of the Appellate court and held that the running of the statute is tolled by commencing the scire facias proceeding within 20 years after the date of the original judgment. Plaintiff thereupon petitioned for leave to appeal, and leave was granted. The judgment of the Supreme court is controlling on plaintiff's right to continue her action.

Defendant has not followed the appeal. We have nothing before us, and our investigation of the subject has produced nothing, to support defendant's contention in the trial court that the death of John Bujak, her co-debtor under the judgment, bars the proceeding for its revival.

The judgment appealed from is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BURKE AND FRIEND, JJ., CONCUR.

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46892

A

ITALO AMERICAN NATIONAL UNION,
etc.,

Plaintiff and Counter-
defendant,
Appellee,

v.

MEAD CYCLE COMPANY, etc., et al.,
Defendants.

MEAD CYCLE COMPANY, a corpora-
tion, and JOSEPH I. BULGER, as
Trustee under Trust Deeds recorded
as Documents Nos. 15371672 and
15403595,

Defendants and Counter-
defendants,
Appellees,

On Appeal of MOTIOGRAPH, INC.,
a corporation,

Defendant and Counter-
plaintiff,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

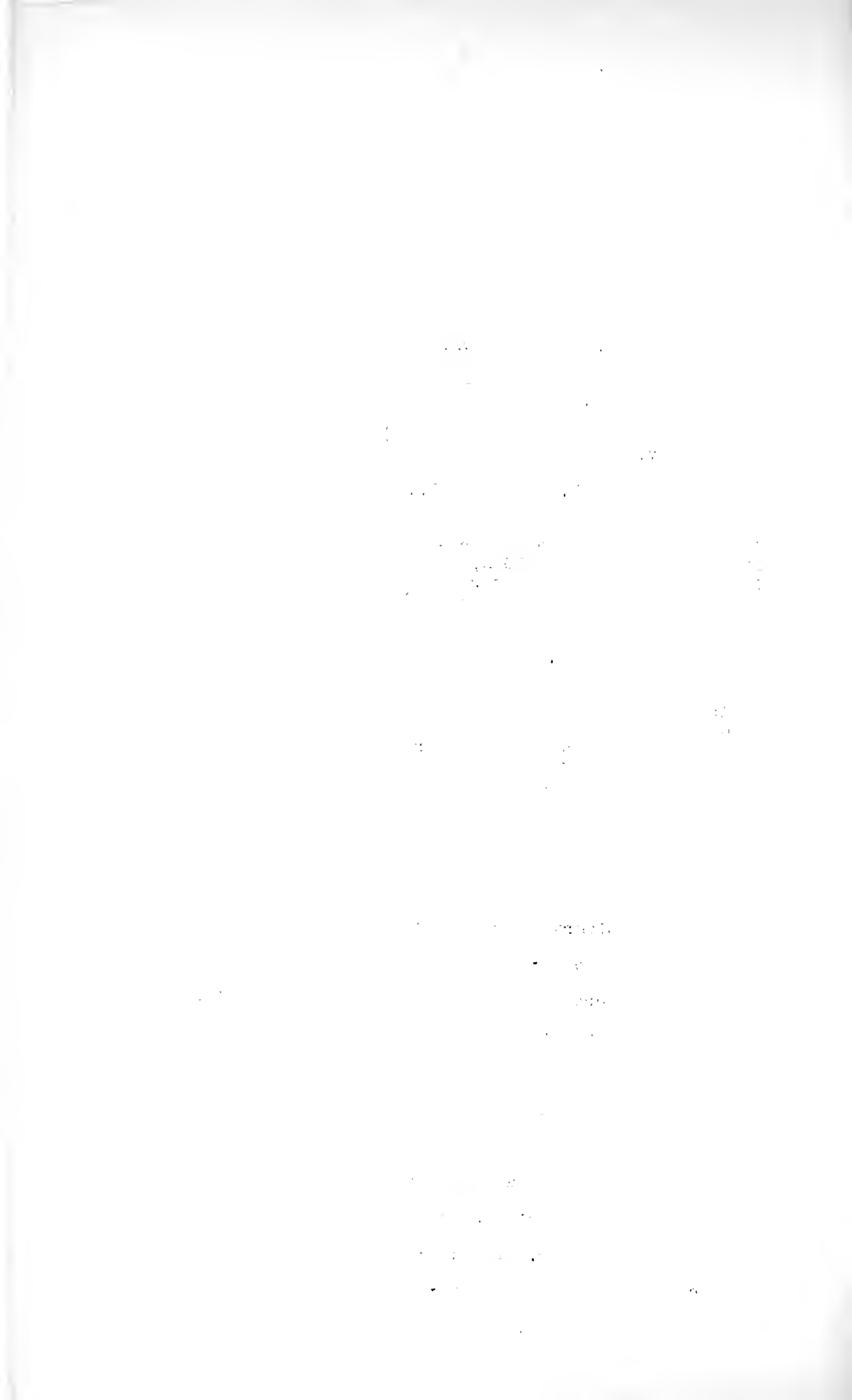
12 I.A.^{2d} 479

ON REHEARING.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF
THE COURT.

Motiograph, Inc., defendant and counterplaintiff,
hereinafter called lessee, appeals from that part of a
foreclosure decree dismissing for want of equity its
counterclaim against the plaintiff in which it prays
that in the event of a sale of the mortgaged premises
the property be sold subject to the lessee's rights under
its lease.

The facts material to this appeal are
admitted in the pleadings. On January 21, 1951 the
mortgagor, as lessor, leased to lessee the first floor
of the 3-story building on the mortgaged premises for a
period of three years, from June 25, 1951 until June 24,



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1954, at a monthly rental of \$500 per month payable in advance, and gave lessee an option to renew the lease for a further period of 36 months on the same terms and conditions for a monthly rental of \$600 per month payable in advance, with the last three rental payments--\$1800--payable at the time of the exercise of the option by notice in writing to the lessor six months prior to the expiration of the lease. By agreements dated December 18, 1951 and April 28, 1952 lessee surrendered to lessor part of the space rented to it, and in consideration thereof the monthly rental was reduced to \$300.

May 18, 1952 and July 19, 1952 the mortgagor executed the trust deeds involved herein. Lessee exercised its option to renew the lease and on January 20, 1954 a written lease was entered into between lessee and lessor, leasing to lessee that portion of the mortgaged premises then occupied by it under the lease of January 21, 1951, as modified, for the period from June 25, 1954 until June 24, 1957 at a monthly rental of \$300 per month payable in advance. Concurrently with the execution of the lease, lessee deposited with lessor \$1500 as collateral security for the payment of the rent and the faithful performance of the lease, otherwise to apply as rent for the last five months of the lease. The lease also contained an option to renew for a further period of three years on the same terms and conditions, for a like monthly rental of \$300 payable in advance, with the last

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five rental payments (\$1500) payable at the time of the exercise of the option by notice in writing to the lessor six months prior to the expiration of the term of the lease.

Lessee occupied the space described in the first lease, as modified, and in the second lease continuously since June 25, 1951, openly, visibly and uninterruptedly. November 3, 1954 plaintiff instituted this foreclosure suit. On February 8, 1955 lessee was made a party defendant, plaintiff alleging lessee's tenancy of a part of the mortgaged premises under the above mentioned lease of January 20, 1954 and the deposit of \$1500 as aforesaid. Lessee answered, stating that its tenancy of the premises was continuous under written leases from June 25, 1951. It also filed a counterclaim, alleging in substance the foregoing facts and praying that in the event of a sale of the mortgaged premises the rights of the plaintiff be declared subordinate to the rights of the lessee and that the premises be sold subject to lessee's rights; for relief in respect to the \$1500 deposited under the lease, and for general relief. The case was referred to a master, who found the facts substantially as stated herein but reported conclusions of law adverse to lessee. Exceptions to the report were overruled, and in the decree awarding foreclosure the counterclaim of lessee was dismissed for want of equity.

Lessee's position is, that being in open and visible possession of a part of the mortgaged premises,

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plaintiff was bound to inquire of it by what tenure it held and what interest it claimed, and was put on notice of all claims, legal and equitable, which such inquiry would have disclosed (Stein v. Green, 6 Ill.2d 234, 242, Ambrosius v. Katz, 2 Ill.2d 173); that plaintiff having failed to inquire of lessee, the latter's rights under the lease as a renewal of the first lease are superior to the rights of plaintiff. Plaintiff contends that the parties abandoned the first lease and that the lease of January 20, 1954 is a new lease and not a renewal of the 1951 lease. Plaintiff cites only two cases: Vincent v. Laurent, 165 Ill. App. 397, and Smith v. Bradley, 336 Ill. App. 272. They are forcible entry and detainer cases in which the controlling question was whether the lessee had exercised his option for renewal or extension of the lease. They have no application to the present case, where plaintiff admits in its answer to the counterclaim that lessee exercised its option to renew the 1951 lease and that the parties entered into a new lease for the space occupied by the lessee under the first lease as modified. This admission bars plaintiff from taking the position now urged on appeal that the execution of the new lease for the monthly rental of \$300 instead of \$600, as provided in the option, is an abandonment of the option. Moreover, the position taken by plaintiff is ^scontrary to the construction the parties placed on the effect of the reduction of the space leased and the rent to be paid under the first lease, that this reduction necessarily

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reduced the rent to be paid on the exercise of the option for a renewal of the lease. Plaintiff has not suffered by the renewal of the lease for the part of the premises occupied by lessee at \$300 a month. Plaintiff alleges in the complaint that the neighborhood in which the mortgaged premises are located has deteriorated and that the rental value of the entire building does not exceed \$300 per month.

Plaintiff also contends that the provision in the second lease giving lessee an option to renew ~~that~~ lease for a three year term expiring June 24, 1960, is unauthorized by the terms of the 1951 lease. This is correct. The option, however, is valid as to the lessor. The lease for the three year term expiring June 24, 1957 is binding on all parties, including plaintiff, and the rights of lessee under that lease are superior to the rights of plaintiff under the trust deeds executed after the first lease.

Lessee prays further in its counterclaim that the court hold that the lessor received as trustee for lessee the \$1500 deposited with lessor under the terms of the second lease; that a rule be entered upon lessor to deposit forthwith with the receiver appointed herein the said sum of \$1500, to be held by the receiver until the further order of the court; that should the court find that the lessor failed to comply with the rule, the court enter an order finding that lessee's rent is paid five months in advance and excusing lessee from the payment of rent forthwith for a period of five months. The lessor has not followed the appeal.

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With respect to the deposit of the \$1500, the lease provides:

"In addition the Lessee has this day deposited with the lessor the sum of One Thousand five hundred dollars (\$1,500.00), the receipt whereof is hereby acknowledged by the Lessor, as collateral security for the payment of the rents to grow due under the terms of this lease, and for the faithful performance by the Lessee of all other obligations hereunder, and for the payment of any and all sums of money for which they may be, or become liable hereunder, otherwise the said sum of One Thousand five hundred dollars (\$1,500.00), shall apply as rent for the last five months of this lease."

The relief prayed is inconsistent with the provisions of the lease covering the deposit of the \$1500, and the latter must control. The money was deposited not only as collateral security for the faithful performance of all obligations of the lessee under the lease, but also as rent for the last five months of the lease. In no event was the deposit, or any part thereof, to be returned to the lessee. If the lessee did not breach the lease, the fund was to be held by the lessor as payment of rent for the last five months. The money, therefore, became the property of the lessor immediately upon its payment or deposit, to be used first for the payment of damages, if any, resulting from any breach of the lease by lessee, and then for the payment of the rent at the end of the term. There is no trust relation between the parties and the court cannot alter the terms of the contract between them.

The decree, in so far as it fails to find that the rights of lessee under the second lease are superior

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to the rights of plaintiff as mortgagor, and fails to direct that the sale of the premises under the decree be subject to the right, title and interest of the lessee under its lease, is reversed, and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED

BURKE and FRIEND, JJ., CONCUR.



Case No. 612

Italo American National Union, etc., Plaintiff and Counter-Defendant, Appellee, v. Mead Cycle Company, etc., et al., Defendants. Mead Cycle Company, and Joseph I. Bulger, as Trustee under Trust Deeds recorded as Documents Nos. 15371672 and 15403595, Defendants and Counter Defendants, Appellees.
On Appeal of Motiograph, Inc., Defendant and Counter-Plaintiff, Appellant.

Gen. No. 46,892.(Abstract of Decision).

First District, First Division.

June 21, 1956.

Notice and Record of Title, § 20*—notice from tenant's possession.

Where defendant was in open and visible possession of part of building tenanted under lease before landlord executed trust deeds, plaintiff trustee is charged with notice of terms of first lease and rights of defendant hereunder, including right to renew lease for three-year period, and where defendant exercised such right the rights of defendant under second lease were superior to rights of plaintiff under trust deeds.

Appeal from the Superior Court of Cook county; the hon. JOHN J. LUPE, Judge, presiding. Reversed and Remanded. Stanley Werdell, for Appellant; Francis A. Fanelli and G. J. Devanna, for Italo-American National Union, ~~an Illinois Fraternal Corporation,~~ and Joseph I. Bulger, trustee pro se, for appellee. Opinion by JUDGE NIEMEYER. Not to be published in full.

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Error to the
Municipal Court of Chicago;
Superior Court of Cook County;
Appeal from the
Circuit Court of
County Court of
City Court of

the Hon. , Judge, presiding.

Affirmed
Reversed

Reversed and remanded with directions.

Heard in the
division, first district, this court at the

term

for appellants;

for plaintiffs in error;

for appellees;

for defendants in error.

Opinion by PRESIDING JUSTICE

Not to be published in full. Opinion filed

; rehearing

denied
; released for publication

46892

ITALO AMERICAN NATIONAL UNION,
etc.,

Plaintiff and Counter
Defendant,
Appellee,

v.

MEAD CYCLE COMPANY, etc., et al.,
Defendants.

MEAD CYCLE COMPANY, a corpora-
tion, and JOSEPH I. BULGER, as
Trustee under Trust Deeds
recorded as Documents Nos. 15371672
and 15403595,

Defendants and Counter
Defendants,
Appellees,

On Appeal of MOTIOGRAPH, INC.,
a corporation,

Defendant and Counter
Plaintiff,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Motiograph, Inc., defendant and counterplaintiff,
hereinafter called lessee, appeals from that part of a fore-
closure decree dismissing for want of equity its counter-
claim against the plaintiff in which it prays that in the
event of a sale of the mortgaged premises the property
be sold subject to lessee's rights under its lease.

The facts material to this appeal are admitted in
the pleadings. On January 21, 1951 the mortgagor, as
lessor, leased to lessee the first floor of the 3-story
building on the mortgaged premises for a period of three
years, from June 25, 1951 until June 24, 1954, at a
monthly rental of \$500 per month payable in advance, and

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gave lessee an option to renew the lease for a further period of 36 months on the same terms and conditions for a monthly rental of \$600 per month payable in advance, with the last three rental payments--\$1800--payable at the time of the exercise of the option by notice in writing to the lessor six months prior to the expiration of the lease. By agreements ~~dated~~ dated December 18, 1951 and April 28, 1952 lessee surrendered to lessor part of the space rented to it, and in consideration thereof the monthly rental was reduced to \$300.

May 18, 1952 and July 19, 1952 the mortgagor executed the trust deeds involved herein. Lessee exercised its option to renew the lease and on January 20, 1954 a written lease was entered into between lessee and lessor, leasing to lessee that portion of the mortgaged premises then occupied by it under the lease of January 21, 1951, as modified, for the period from June 25, 1954 until June 24, 1957 at a monthly rental of \$300 per month payable in advance. Concurrently with the execution of the lease, lessee deposited with lessor \$1500 as collateral security for the payment of the rent and the faithful performance of the lease, otherwise to apply as rent for the last five months of the lease. The lease also contained an option to renew for a further period of three years on the same terms and conditions, for a like monthly rental of \$300 payable in advance, with the last five rental payments (\$1500) payable at the time of the exercise of the option by notice in writing to the lessor six months prior to the expiration

of the term of the lease.

Lessee occupied the space described in the first lease, as modified, and in the second lease continuously since June 25, 1951, openly, visibly and uninterruptedly. November 3, 1954 plaintiff instituted this foreclosure suit. On February 8, 1955 lessee was made a party defendant, plaintiff alleging lessee's tenancy of a part of the mortgaged premises under the above mentioned lease of January 20, 1954 and the deposit of \$1500 as aforesaid. Lessee answered, stating that its tenancy of the premises was continuous under written leases from June 25, 1951. It also filed a counterclaim, alleging in substance the foregoing facts and praying that in the event of a sale of the mortgaged premises the rights of the plaintiff be declared subordinate to the rights of the lessee and that the premises be sold subject to lessee's rights; for relief in respect to the \$1500 deposited under the lease, and for general relief. The case was referred to a master, who found the facts substantially as stated herein but reported conclusions of law adverse to lessee. Exceptions to the report were overruled, and in the decree awarding foreclosure the counterclaim of lessee was dismissed for want of equity.

Lessee's position is, that being in open and visible possession of a part of the mortgaged premises, plaintiff was bound to inquire of it by what tenure it held and what interest it claimed, and was put on notice of all claims, legal and equitable, which such inquiry would have disclosed

(Stein v. Green, 6 Ill.2d 234, 242, Ambrosius v. Katz, 2 Ill.2d 173); that plaintiff having failed to inquire of lessee, the latter's rights under the lease as a renewal of the first lease are superior to the rights of plaintiff. Plaintiff contends that the parties abandoned the first lease and that the lease of January 20, 1954 is a new lease and not a renewal of the 1951 lease. Plaintiff cites only two cases: Vincent v. Laurent, 165 Ill. App. 397, and Smith v. Bradley, 336 Ill. App. 272. They are forcible entry and detainer cases in which the controlling question was whether the lessee had exercised his option for renewal or extension of the lease. They have no application to the present case, where plaintiff admits in its answer to the counterclaim that lessee exercised its option to renew the 1951 lease and that the parties entered into a new lease for the space occupied by the lessee under the first lease as modified. This admission bars plaintiff from taking the position now urged on appeal that the execution of the new lease for the monthly rental of \$300 instead of \$600, as provided in the option, is an abandonment of the option. Moreover, the position taken by plaintiff is contrary to the construction the parties placed on the effect of the reduction of the space leased and the rent to be paid under the first lease, that this reduction necessarily reduced the rent to be paid on the exercise of the option for a renewal of the lease. Plaintiff has not suffered by the renewal of the lease for the part of the premises occupied by lessee at \$300 a month. Plaintiff alleges in the complaint that the neighborhood in which the mortgaged premises are located has deteriorated and that the rental value of the entire building does not exceed \$300 per month.

THE 17th of the month of the year 1884
at the City of New York
I, the undersigned, Clerk of the Court of the County of New York,
do hereby certify that the within and foregoing is a true and correct
copy of the original of the same as the same appears from the
records of the Court of the County of New York.

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Plaintiff also contends that the provision in the second lease giving lessee an option to renew that lease for a three year term expiring June 24, 1960, is unauthorized by the terms of the 1951 lease. This is correct. The option, however, is valid as to the lessor. The lease for the three year term expiring June 24, 1957 is binding on all parties, including plaintiff.

Although the lessor is a party to the foreclosure suit, it is not a party to the counterclaim. No relief can be granted against it as to the \$1500 deposit.

The second lease is a renewal of the first lease, for a three year term expiring June 24, 1957, authorized by the terms of the first lease as modified by the parties. Plaintiff is charged with notice of the terms of the first lease and the rights of the lessee thereunder, including the right to enter into the second lease. The rights of lessee under the second lease are superior to the rights of plaintiff under the trust deeds executed after the first lease.

The portion of the decree appealed from is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

FRIEND, P. J. and BURKE, J., CONCUR.

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ERROR TO

COUNTY COURT

COOK COUNTY

12 I.A. 4-0

Defendant seeks the reversal, on writ of error, of a judgment entered on a verdict of a jury finding him guilty on three counts of an information charging him with practicing dentistry without being possessed of an existing license so to do issued by the State of Illinois. He was sentenced to pay a fine of \$350 and placed on probation for one year.

The information contained five counts. In each count defendant was charged with a separate and distinct act in violation of the statute, as follows: Offering to supply and construct an upper denture for Marie Gannon, a prospective user (Count 1); Taking an impression of the upper and lower jaws of Marie Gannon (Count 2); Furnishing, supplying and constructing an upper denture for Marie Gannon with the intention of receiving therefor a fee (Count 3); Maintaining offices for the practice of dentistry on Cicero avenue and on Harrison street, where dental operations were performed on Marie Gannon (Count 4); and grinding an upper denture and placing same in the mouth of Marie Gannon (Count 5). The acts charged in the first four



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counts are alleged to have been committed on March 18, 1954, and the act charged in the fifth count as having been committed on August 12, 1954. The jury found defendant guilty on counts 1, 2 and 3. It made no finding with respect to counts 4 and 5. This was an acquittal under these counts. People v. Bell, 328 Ill. 446.

Defendant is a dental technician. Marie Gannon, the complaining witness, testified that on March 18, 1954 she went to defendant at his dental laboratory on Cicero avenue on the recommendation of her cousin for a denture, that defendant took her to the basement of his home on Harrison street, eleven blocks away, where he took an impression of her upper and lower jaws; later in the day defendant took her to the office of a dentist, who extracted six teeth; defendant then gave a denture to the dentist, who put it in the mouth of the witness; she paid defendant \$50; the denture was not satisfactory; she went eight or nine times to the dental laboratory, where defendant ground the denture; she was there on August 12, 1954 when he again ground it. The dentist testified that defendant brought Marie Gannon to his office; that he extracted six teeth and then placed in her mouth a denture which defendant brought with him. Defendant testified that he never met Mrs. Gannon in his life and, supported by his wife, contradicts the testimony of Mrs. Gannon as to her transactions with him. The jury and the trial judge, who heard and saw the witnesses, have accepted the testimony of Mrs. Gannon and rejected the testimony on behalf of defendant. The testimony



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of Mrs. Gannon, standing alone, establishes the violations of the statute charged in counts 1, 2 and 3. We cannot say that the verdict is against the manifest weight of the evidence.

Defendant filed a written motion for a new trial, in which he assigned six grounds for granting the motion. The only assignment relating to the giving or refusal of instructions, is that "The court erred in not giving instruction numbered ten, marked 'Refused', asked for by the defendant in said cause." The refusal to give this instruction is not argued and is waived. When grounds in support of a written motion for a new trial are assigned, the moving party is limited to the errors assigned and is held to have waived all errors not assigned. People v. Flynn, 8 Ill.2d 116. Defendant cannot raise the error, if any, in giving the instructions complained of in his brief.

Defendant contends that the verdict is inconsistent in finding him guilty on the first three counts and acquitting him on counts 4 and 5. The jury was instructed, without objection by defendant in the trial court, <sup>that</sup> "The court instructs the jury that the specific charges made against the defendant in the first, second, third, fourth and fifth counts are separate and distinct, each from the other, and a verdict of guilty, if such verdict is rendered, as to any one or more of said counts can be entirely consistent with his acquittal





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on any of the remaining counts." Having acquiesced in the giving of this instruction, defendant should not be heard to complain that the jury acted in accordance with it. However, we find no inconsistency in the verdict. Acquittal of an act charged to have been committed on August 12, 1954 (Count 5), cannot prevent conviction of acts charged in the four ~~preceding~~ counts to have been committed on March 18, 1954. Likewise, acquittal of maintaining offices for the practice of dentistry on North Cicero Avenue and on West Harrison Street, charged in count 4, is not inconsistent with the finding of guilty of performing the isolated acts charged in counts 1, 2 and 3.

Defendant further urges that the jury was misled and confused because it was not instructed as to the charges in the various counts of the information. Neither the opening statement nor the arguments to the jury are incorporated in the report of the proceedings. It may be that in the opening statement or in the arguments, or in both of them, the jury was fully advised of the charges of the respective counts. In any event the record discloses no confusion on the part of the jury. It specified counts as to which it found defendant guilty, and, as above shown, that finding is not inconsistent with the acquittal on the remaining counts.

The judgment is affirmed.

AFFIRMED.

BURKE AND FRIEND, JJ., CONCUR.



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47001

PEOPLE OF THE STATE OF ILLINOIS  
ex rel. JOHN T. McNAMARA,

Appellant,

v.

TIMOTHY J. O'CONNOR, Commissioner  
of Police of the City of Chicago,  
STEPHEN E. HURLEY, ALBERT W.  
WILLIAMS and JOHN J. AHERN, Civil  
Service Commissioners of the City  
of Chicago, WILLIAM J. MILOTA,  
Treasurer of the City of Chicago,  
and J. H. DILLARD, Comptroller,

Appellees

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

12 I.A.<sup>2d</sup> 471

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

Plaintiff, John T. McNamara, a discharged probationary patrolman in the classified service of the City of Chicago, appeals from an order striking his complaint for mandamus and dismissing his suit for a writ of mandamus to compel his restoration to the position from which he was discharged and the payment of his salary illegally withheld during his discharge.

The complaint, filed October 14, 1953, alleges the taking of an examination for patrolman in the classified civil service in the Department of Police of the City of Chicago, the passing of the examination, the certification of plaintiff by the Civil Service Commission and his appointment by the Commissioner of Police; that on December 6, 1951 the Commissioner of Police requested authority from the Civil Service Commission to dismiss petitioner from the service, and on December 17, 1951



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such authority was granted and plaintiff was dismissed; that plaintiff was not granted a hearing and the charge against him was unfounded and baseless. The date of plaintiff's appointment by the Commissioner of Police is not alleged. December 20, 1954 the cause was dismissed for want of prosecution. This order was vacated and set aside and the cause reinstated on January 18, 1955, the defendants being given leave to withdraw their motion to strike, then on file, and to file a new motion within ten days. In the new motion, filed January 21, 1955, seven grounds for allowing the motion are stated. We need only consider the charge of laches in bringing the suit. From the motion it appears that the original entrance examination for patrolman taken by plaintiff was held on November 4, 1946 and March 22, 1947; the list was posted September 12, 1947, plaintiff was certified July 19, 1951, appointed a patrolman on July 30, 1951 and discharged on December 12, 1951. The record before us shows no further action in the cause until February 8, 1956, when, the cause coming on to be heard on the amended motion of defendants to strike the complaint for mandamus and to dismiss the suit, the motion was allowed and the suit dismissed.

The motion also sets out section 10 of the Cities Civil Service Act (Ill. Rev. Stats. 1951, chap. 24 1/2, par. 48), providing for the discharge of an appointee at or before the expiration of the period of



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probation by the head of the department or office in which he may be employed, by and with the consent of the commission, "upon assigning in writing his reason therefor to said commission," and section 5 of Rule IV of the Civil Service Commission, fixing the period of probation at six months and providing that in no case shall a probationer be discharged until after the appointing officer has received from the commission a notice in writing that the commission has approved such discharge.

As hereinbefore stated, we need only refer to the defense of laches. It appears from the record that suit was instituted approximately 22 months after the discharge, and permitted to lie dormant and be dismissed for want of prosecution 14 months later; that after reinstatement of the cause on January 18, 1955 and the filing of defendants' motion three days later, no steps were taken in the case until more than a year later when the cause was dismissed on defendants' motion. The record shows a total lack of diligence on the part of plaintiff in prosecuting whatever claim he might have. The writ of mandamus is not a writ of right, but rests in the sound discretion of the court. We think that, by analogy, the rules governing laches in seeking relief by the common law writ of certiorari are controlling. Defendants cite a number of cases. We shall refer only to two.

In City of Chicago v. Condell, 224 Ill. 595, a petition for a common law writ of certiorari to review a decision of the Civil Service Commission of Chicago

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in discharging a member of the police department, where the petition was filed about one and a half years after the proceedings complained of were had, the Supreme court reversed the judgments of the Superior and Appellate courts granting relief, quashed the writ and dismissed the petition, and said (p. 598):

"Appellant was in no way responsible for the delay, and certainly the penalties of such delay should not be visited upon it. It is true that mere lapse of time, alone, short of the limitation for the prosecution of a writ of error, will not bar the issuing of the common law writ of certiorari; but where a detriment or inconvenience to the public will result, a party is required to act speedily in making his application and any unreasonable delay will warrant the refusal of the writ. (Trustees of Schools v. School Directors, *supra*; Hyslop v. Finch, *supra*; 4 Ency. of Pl. & Pr. 133.) To restore appellee to his position would confer upon him the right to require the payment of his salary to the date of his restoration. Where such consequences must result to the public, a delay for the length of time that elapsed between appellee's discharge and the date of filing his petition is unreasonable and the writ should have been denied."

In Connolly v. Upham, 340 Ill. App. 387 (leave to appeal denied, 341 Ill. App. xv), it was held that certiorari to review a decision of the Retirement Board of the Firemen's Annuity and Benefit Fund should not issue after six months, unless the delay is satisfactorily explained in the petition and proven. The court said (p. 391): "Since City of Chicago v. Condell, 224 Ill. 595 (1907), six months has been established as the limitation period during which the writ of certiorari must be filed, unless a reasonable excuse is shown for the delay." The court then traced the



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history of this rule from the Condell case to Carroll v. Houston, 341 Ill. 531. In the instant case no attempt was made to excuse the delay in plaintiff's action by allegation in the complaint or by reply to the motion to dismiss.

The order is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.



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46972

THOMAS L. BOUCHER,

Appellee,

v.

MICHAEL S. NUCCIO,

Appellant.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

12 I.A.<sup>2d</sup> 482

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Thomas L. Boucher filed a complaint in equity for the dissolution of a partnership. The parties operated under an oral partnership agreement and engaged in the real estate and insurance business as "Glen Oak Realty Associates." At the hearing before the master in chancery to whom the case was referred the principal disputed question was whether a certain real estate transaction, more commonly identified as the Swenson-Murray deal, was a partnership transaction. If that deal was a partnership transaction, the question then presented was whether the defendant was entitled to share equally in plaintiff's profit of \$10,605.30 therein.

The master found with respect to the Swenson-Murray deal that the equities were with the defendant; that the partnership included an agreement to buy and sell on their account; that the Swenson purchase and the Murray sale were consummated during the existence of the partnership and recommended that the defendant should receive credit from plaintiff<sup>of</sup> one-half of the profits on that deal; and that defendant is entitled to participate in any profit resulting from that part of the Murray contract which provides that plaintiff should be entitled to 2-1/2% of the sale price

*Journal of Management Education* 30(6)

of all houses sold on the Swenson-Murray acreage. The chancellor, after considering plaintiff's exceptions to the master's report, made certain findings of fact in conformity with plaintiff's contentions and decreed that in so far as plaintiff's exceptions conform with the chancellor's findings of fact, they were sustained and in all other matters overruled.

The chancellor found that the parties orally agreed to form a partnership for the purpose of engaging in the real estate and insurance brokerage business; that during the summer of 1954 they discussed the continuation of the partnership on three occasions; that in the middle of September, 1954, plaintiff informed defendant that the partnership was dissolved and that plaintiff would remain and close pending deals for the clients of the partnership until September 30, 1954, for the purpose of winding up the affairs of the partnership; that no partnership funds were used in the purchase of real estate by the partners; and that the partnership did not include on its books of account as an asset of the partnership any property which may have been purchased by the partners individually, together or with other people during the existence of the partnership. The decree further found that defendant failed to prove that the Swenson-Murray deal was a partnership transaction and that the parties have never agreed that buying and selling real estate was to be within the scope of the partnership; that the partnership is entitled





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to a brokerage commission not to exceed 5% on the sale price of \$31,740 of the Swenson property by plaintiff to Murray; and that defendant is entitled to share equally with plaintiff if, as, and when plaintiff is paid any of the 2-1/2% commission set forth in plaintiff's agreement with Murray. Defendant appeals from the decree.

During the course of the litigation the parties resolved all the issues except those arising out of the Swenson-Murray deal. That presented a factual issue. The evidence is conflicting as to whether the parties agreed to buy and sell real estate on behalf of the partnership. The defendant operated a real estate and insurance business with an office at 626 Waukegan Road, Glenview, under the trade name of Glen Oak Realty Associates. Plaintiff, who had been a licensed real estate broker since October, 1953, came to the defendant's office in March, 1954. He spoke to the defendant about forming a partnership for the conduct of the real estate business. As a result of the conversation they formed a partnership, each agreeing to contribute \$2,000 to the capital. Plaintiff deposited \$2,000 in cash and defendant \$2,000 in cash and property. They agreed to divide the profits and expenses equally. The insurance brokerage business theretofore conducted by the defendant was to be included in the activities of the partnership. Should the partnership be dissolved, defendant would have the



right to retain the use of the trade name. The parties retained a lawyer, Melvin J. McGowan, to draft a partnership agreement. He prepared and delivered to the partners a proposed partnership agreement. This agreement was not signed. Plaintiff testified that the partnership was not to include the buying and selling of real estate and that he did not sign the proposed agreement because it made a reference to the buying and selling of real estate. The defendant did not offer any explanation as to why he did not sign the agreement. The unsigned agreement was retained in the partnership files. The defendant and Mr. McGowan testified that the proposed partnership agreement conformed to the oral direction of the parties to the attorney and contained the provision that the partnership included the buying and selling of real estate.

A painted sign was maintained on Waukegan Road by the partnership with the inscription "We buy and sell real estate." During the existence of the partnership 22 deals were consummated. On two separate occasions the partnership purchased real estate which was subsequently resold at a profit to the partners, and on one occasion all of the profits were deposited to the account of the partnership. Members of the Swenson family owned 7.935 acres of land on the north side of Glenview Road in Glenview. Prior to the formation of the partnership the plaintiff had been negotiating with the Swensons about the sale of their parcel of land. During the existence of the partnership plaintiff



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had discussed with defendant the advisability of the partnership acquiring the Swenson tract. The defendant was desirous of joining in the purchase. The partners consulted with Bernard T. Hogan, a friend of the defendant, with a view to borrowing \$20,000 for the acquisition of this property. Hogan agreed to advance to the partnership the amount of money necessary for the purchase of the property and was to participate in the deal on an equal basis with the partners.

During the summer of 1954 Robert Murray, associated with two other persons in the building business, came to the partnership office and for the first time met the partners. He stated that he was interested in acquiring vacant real estate in the area. As a result of this conversation two separate pieces of property were sold to Murray resulting in profit to the partners. On September 14, 1954, plaintiff prepared an offer to purchase the Swenson tract at \$2,600 per acre. The offer was prepared on the stationery and in the office of Glen Oak Realty. On September 17, 1954, the Swensons executed the agreement and it was delivered to plaintiff. On September 22, 1954, plaintiff prepared an agreement at the office of the Glen Oak Realty on one of their form contracts and presented it to Murray offering to sell the Swenson tract to him at \$4,000 per acre. It was executed by Murray on the same day. After plaintiff had withdrawn from the partnership the defendant found the agreement in the files of Glen Oak Realty. Subsequent to the termination of the partnership the sale to Murray was consummated by plaintiff.



The proposed partnership agreement was not binding on the parties. This exhibit is important in determining the issue. It supports the testimony of defendant and Mr. McGowan that the partnership activities included the buying and selling of real estate. Clauses concerning this activity appear in Paragraphs 1 and 11 of the proposed agreement. It also contains the provision requested by the defendant that should the partnership be dissolved, he would have the right to retain the use of the trade name. Plaintiff points out that the agreement does not include the insurance brokerage business which the parties had agreed would be part of their activities. The insertion of the clause about the buying and selling of real estate was a positive act. On the other hand, leaving out the reference to the insurance brokerage phase of the business would be consistent with a failure to so inform Mr. McGowan or an oversight. The attorney would not obtain such information as the business activities of the partnership from a form book. The proposed agreement and the testimony of Mr. McGowan are strong support for defendant's position. The sign on Waukegan Road with the inscription that the partners buy and sell real estate also supports the contention of the defendant.

Murray was a customer of the partnership at the time plaintiff acquired the Swenson tract. The tract was acquired by plaintiff with the intention of selling it to Murray and his associates. We are convinced that this is the kind of transaction which was within the scope of the partner-





ship, and that it arose while the partnership was in existence. Plaintiff used the office facilities of the partnership for the preparation of the Swenson contracts and he dealt with a customer of the partnership. Plaintiff states that the testimony of defendant takes the Swenson-Murray transaction out of the scope of the partnership business, pointing out that the transaction was to include Hogan and that the latter was not a partner. The proposal whereby plaintiff, defendant and Hogan were to purchase the property with Hogan advancing the necessary funds was not acted upon by plaintiff. Disregarding this proposal, he purchased the property for his own benefit and seeks to retain the profit. We cannot agree that the testimony of the defendant is inconsistent with his position. That no partnership funds were used and that there was no record of the transaction on the partnership books are not controlling under the factual situation. It appears that there was a ready market for the real estate and that funds were available to the partners.

We are of the opinion that the findings and recommendations of the master in chancery are strongly supported by the record. He saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of fact does not carry the same weight as the verdict of a jury nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review



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of the cause. Pasedach v. Auw, 364 Ill. 491, 496; Brainard v. Brainard, 373 Ill. 459, 461. Therefore, the decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter a decree in accordance with the findings and recommendations of the master in chancery.

DECREE REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and Friend, J., concur.



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46873

CARLA B. HATHEWAY, et al.,  
Plaintiffs-Appellees,

v.

STELLA LA ZELLE BARNHART,  
individually and as trustee  
etc., et al.,  
Defendants-Appellants,

In re Petitions of

MORGAN L. FITCH, etc.,  
Intervenor-Appellee,  
HIRAM P. BARNHART, JR., et al.,  
Defendants-Appellees,  
WILLIS JUDSON BARNHART, et al.,  
Defendants-Appellees,  
STELLA LA ZELLE BARNHART, etc.,  
et al.,  
Defendants-Appellants,  
CARLA B. HATHEWAY, et al.,  
Plaintiffs-Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

12 I.A. 4-3

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Arthur M. Barnhart, a man of considerable wealth who had for many years been engaged in the type foundry business in Chicago with certain of his brothers and nephews, executed his will on July 20, 1911. He was then 67 years of age. He died on May 13, 1913. His family surviving him consisted of his widow, Stella La Zelle Barnhart, their son, Arthur M. Barnhart, Jr., then 9 years old, and collateral relatives. The will left a substantial estate in trust, naming the widow and son to share in it for life. His will was admitted to probate in Cook County on July 18, 1913. By the will he gave his entire estate to trustees to be held, managed and invested as directed. Named as trustees were the widow and two of testator's nephews. The son of the testator. was also designated

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to become a trustee on reaching 21 years of age. The probate court proceedings show that the estate consisting of both real and personal property was valued at \$1,341,000. Following the probate of the will the nephews named as trustees resigned. The widow continued to act as trustee and later her mother, N. Florence La Zelle, and her brother, Livy L. La Zelle, were appointed successor trustees to act with her. On December 10, 1922, Arthur M. Barnhart, Jr., attained his majority and became a fourth trustee under the will. On December 11, 1934, N. Florence La Zelle died but no successor trustee was appointed. On April 7, 1936, Arthur M. Barnhart, Jr., died intestate and a bachelor.

By their original complaint filed in the Circuit Court of Cook County on August 13, 1936, plaintiffs, who are descendants of full brothers and sisters of Arthur M. Barnhart, Sr., sought an accounting from Stella La Zelle Barnhart and Livy L. La Zelle as trustees under the will. The complaint also sought removal of the trustees, damages for alleged acts of wrongful investment, waste and mismanagement and the assessment of costs and expenses against the trust estate. The complaint asks that the court find and determine that the plaintiffs are the heirs-at-law of the testator and that they or their descendants are or will be the only persons entitled to share in the distribution of the corpus of the trust. Certain descendants of brothers of the half-blood of Arthur M. Barnhart, Sr., were made defendants and as to them the relief sought was that the

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court find and decree that they had no interest in the corpus of the trust provided for in the will. The cause was referred to a master in chancery. The chancellor sustained the exception to the master's report and entered a decree that it was the intention of the testator that the corpus of the trust estate be distributed to the persons constituting his heirs-at-law as of the date of the death of his widow, that the widow had no interest in the corpus of the trust and that none of the parties was entitled to an allowance for attorneys' fees and costs from the trust. The court decided the proportions in which the parties would ultimately share in the corpus of the trust, according to descendants of collateral relatives of the half-blood the same status as those of the full-blood. The chancellor held that those interested would be entitled to an accounting only if they could substantiate the charges of waste and mismanagement alleged in the complaint. It was further decided that a vacancy existed among the trustees under the provisions of the will. The decree entered on March 21, 1952, appointed Morgan L. Fitch a successor trustee. By the decree the cause was referred to a master in chancery for the purpose of taking testimony on all issues raised by the pleadings and not passed upon and disposed of by the decree. Stella La Zelle Barnhart, individually and as administratrix of the estate of Arthur M. Barnhart, Jr., deceased, appealed from the decree.

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In an opinion filed May 20, 1953, Barnhart v. Barnhart, 415 Ill. 303, the Supreme Court held that the trial court correctly construed the will to mean those persons who would constitute the heirs-at-law of the testator under the Statutes of Descent at the death of the widow and determined at that time; that the collateral relatives will be entitled to the remainder of the estate if they survive the widow, provided however, that if any of them fail to survive, then the persons entitled to the principal of the trust estate will be those who at the date of the death of the life beneficiary will be the heirs-at-law of the testator under the statutes of descent of Illinois determined as of that time. The court found that the ruling of the chancellor that the collateral relatives of the half-blood should take on the same basis as those of the full-blood was correct. The court sustained the appointment of Fitch as a successor trustee to fill the vacancy. The final paragraph of the 1952 decree reserved jurisdiction to grant plaintiffs and the half-blood defendants an accounting if upon a hearing of the cause before the master it shall be proved that the defendant trustees have been guilty of waste or mismanagement in their administration of the trust estate. In answering the question "whether a contingent remainderman by virtue of being such or after demand is entitled to an accounting as a matter of right without any showing of mismanagement or of facts giving rise to an inference of waste or that a property right under the



trust is being dissipated," the Supreme Court said that the right to bring an action "should be afforded only where waste, mismanagement or dissipation of assets appear or can be shown" and held that "the final paragraph of the decree was correct."

In the decree the chancellor declined to order an allowance of attorneys' fees to the various parties to be taxed and paid out of the corpus of the estate. The Supreme Court said (321):

"It is true that the action before us involved an accounting for the purpose of establishing plaintiffs' rights in the trust property. The right to an accounting, however, depended entirely upon a construction of the will. Unless that question was determined in favor of the plaintiffs, there was obviously no right to an accounting. On that question there was a determined contest and there were adverse claims over the disposition of the corpus of the estate at the termination of the trust period. Because of the ambiguous and uncertain terms of the will, it required construction by a court of equity to determine which of the several adverse claimants were entitled to share in the balance of the estate. We are of the opinion that the facts reported in this record justify the attorneys' fees being taxed against and paid by the estate. (In re Estate of Reeve, 393 Ill. 272.) In declining to so order, the decree in this respect is reversed."

The decree of the Circuit Court was affirmed in part and reversed in part and the cause remanded with directions to enter a decree in accordance with the views expressed.

After the remand the Circuit Court on April 6, 1954, entered a final decree. By the provisions of Paragraph J of the decree the cause was referred to a master in chancery "for the purpose of taking testimony on all issues raised by the respective pleadings of the parties to this cause which have not been passed upon and disposed of by the entry of this decree, and reporting his findings <sup>of fact</sup> ^

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1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha, \beta, \gamma, \delta, \epsilon, \zeta, \eta, \theta, \iota, \kappa, \lambda, \mu, \nu, \xi, \omicron, \pi, \rho, \sigma, \tau, \upsilon, \phi, \chi, \psi, \omega, \varphi, \eta, \theta, \iota, \kappa, \lambda, \mu, \nu, \xi, \omicron, \pi, \rho, \sigma, \tau, \upsilon, \phi, \chi, \psi, \omega, \varphi$ .

2. In the second part of the paper, we shall consider the case when the parameters  $\alpha, \beta, \gamma, \delta, \epsilon, \zeta, \eta, \theta, \iota, \kappa, \lambda, \mu, \nu, \xi, \omicron, \pi, \rho, \sigma, \tau, \upsilon, \phi, \chi, \psi, \omega, \varphi$  are not arbitrary, but satisfy certain conditions. In this case, the system of equations (1) can be reduced to a system of equations of the form (2).

and conclusions of law thereon \* \* \*." The decree directed the parties to file claims for attorneys' fees and expenses within 40 days and answers and objections to the claims within a further period, reserved jurisdiction for the purpose of passing upon all claims and objections thereto and for passing upon and determining the amount of allowances to be made to the respective parties. On April 1, 1955, after all the parties had filed petitions and objections, the matter was referred to a master in chancery for the purpose of taking testimony on the issues raised by the respective claims for the allowance of fees and reimbursement of expenses and objections thereto. Petitions for fees aggregating \$273,000 were filed by the various parties and petitions for reimbursement for expenses were also filed aggregating approximately \$14,000. The appellants filed a claim for allowance of fees in the amount of \$98,830.20 and indicated that they would seek an allowance for additional fees in the amount of \$12,500. These petitions covered services rendered by all parties from the beginning of the suit in 1936 to and including the entry of the final decree of April 6, 1954. The master commenced his hearings on April 18, 1955. At the hearing on the afternoon of May 6, 1955, the attorneys for the court-appointed cotrustee, the attorney representing the other two trustees and the life tenant suggested that an effort be made to arrive at a compromise or adjustment of the various claims for fees and expenses.

Thereafter various propositions and counter-





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propositions for settlement of all claims of all parties to the suit were discussed between the respective attorneys for the parties. Various propositions to compromise were rejected. On May 16, 1955, after an extended discussion between the parties, it was finally agreed between all the parties that the plaintiffs would take \$69,000 for their claim of \$95,000, the half-blood defendants would take \$36,750 for their claim of \$65,000, that Willis Judson Barnhart would take \$9,250 for his claim of \$15,000, and that \$50,000 would be allowed to the appellants on their claim which aggregated approximately \$98,000. There is no contention that the fees allowed are unreasonable. It was further agreed that with the exception of the amount payable to Willis Judson Barnhart, the payments to the respective parties would be made in three equal installments. The suggestion for deferring the payments came from counsel for the appellants. It was also agreed that a master's report would be submitted on the basis of the settlement agreement of the parties and that the allowances to the parties should be for all services rendered in connection with the construction of the will from the commencement of the suit to April 6, 1954, and for all services which may have been rendered with respect to the accounting from the commencement of the suit until September 21, 1953. After this agreement Mrs. Barnhart testified in support of the claims of herself and her brother for fees of approximately \$98,000 and there was no cross-examination. Thereafter several preliminary drafts of the proposed report



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of the master were submitted to the respective parties, including the attorney for the appellants. A final draft of the report was prepared, submitted and approved by the parties. At a meeting before the master on June 2, 1955, Mrs. Barnhart indicated that she would not comply with the terms of the agreement and that Mr. Mayo, her attorney, was no longer authorized to represent her. Mr. Mayo then withdrew as attorney for the appellants and other attorneys were substituted.

No formal objections were filed to the master's preliminary report. Mrs. Barnhart was without counsel when it was rendered. The master's report on the allowance of fees and exceptions was filed on June 13, 1955. The appellants filed a motion to set aside or suppress the master's report. On June 13, 1955, the court-appointed cotrustee filed a petition seeking the instructions of the court as to the disposition of the claims for fees and allowances on the basis of the master's report and the agreement of the parties. No answer denying the allegations of the petition was filed by the appellants. The motion of the appellants to suppress the report raises objections to the proceedings followed before the master and in the submission of the report. It does not directly attack any findings of fact or conclusions of law therein. The motion also requested time to file objections to the master's report, but no specific objections as to any particular findings or conclusions were ever tendered on behalf of the appellants.



After extensive hearings before the chancellor at which testimony as to the making of the agreement was introduced, at the request of the chancellor, the court concluded that there had been an agreement between the parties and on July 14, 1955, entered an order approving the master's report and awarding fees and allowances as recommended therein. Mrs. Barnhart, individually and as administratrix of the estate of her deceased son and as trustee under the will of her deceased husband, and Livey La Zelle, individually and as successor cotrustee under the will of Arthur M. Barnhart, Sr., appealing, ask that the order of June 14, 1955, be reversed and that the cause be remanded with directions that adjudication of the subject be stayed until the merits of the litigation be determined in the trial court and for such other relief as may seem proper.

Appellant maintains that the order from which she appeals is incomplete in that it decides no part of the case except to award attorneys' fees for its prosecution, and that it is inequitable because it is incomplete. The opinion of the Supreme Court said that the facts reported in the record justify the attorneys' fees being taxed and paid by the estate. There is nothing in the opinion which restricts the trial court as to the procedure to be followed in determining the fees. The final decree referred the cause to the master in chancery for the purpose of taking testimony and reporting on all issues raised by the pleadings which had not been disposed of by the entry of that decree. This decree did not



contemplate that the master would hear testimony and report on the subject of the fees. It directed that the petitions for fees and the objections thereto be filed after the entry of the decree. It was within the discretion of the chancellor to refer the applications for fees to the master for the taking of testimony and reporting his findings. He did so on April 1, 1955, after the pleadings on that subject<sup>matter</sup> had been filed. That was in accordance with the procedure in courts of chancery. We cannot say that the chancellor abused his discretion in deciding to make a special reference on the subject matter of the fees. Under the factual situation it was within his discretion to award the fees prior to the hearing and determination of the undetermined issues. In the Barnhart case certain parties contended that the 1952 decree was not a final and appealable order since it did not dispose of all of the issues in the case. The court in rejecting the contention said (308):

"We have held that a decree is 'final' within the meaning of that term as used in section 77 of the Civil Practice Act (Ill. Rev. Stat. 1947, chap. 110, par. 201,) if it finally disposes of the rights of the parties either upon the entire controversy or upon some definite and separate branch thereof. (Altschuler v. Altschuler, 399 Ill. 559; Brauer Machine and Supply Co. v. Parkhill Truck Co., 383 Ill. 569.) A decree is final if it determines the ultimate rights of the parties with respect to distinct matters which have no bearing on other matters left for further consideration or if the matters left for future determination are merely incidental to the ultimate rights which have been adjudicated by the decree. (Moore v. Moyle, 405 Ill. 555.) The decree of the circuit court settles and determines the ultimate rights of the parties to the corpus of the trust and is, therefore, upon the above authority a final and appealable order. The remedy by way of an accounting is a mere incident which flows from a right established by the decree. We, therefore, hold that this court has jurisdiction to entertain this appeal."





Appellants say that if the order from which they appeal were entered after January 1, 1956, it would be subject to revision at any time, be unenforceable and unappealable without an express finding under amended Section 50 of the Civil Practice Act that there is no just reason for delaying enforcement or appeal. As the amended rule became effective subsequent to the entry of the order the amendment is not relevant to any point urged on this appeal. The appellees point out that the order directs the payment of money on or before a particular date and thereby expresses the court's determination that there is no just reason for delay.

Appellants assert that the widow was deprived of a hearing on the merits of the case as a result of the chancellor's violation of trial court Rule 58, when he erroneously denied the motion to order proofs closed before the master on the issues of the case and denied a stay until the master rendered his report on the merits of the case. Rule 58 provides in part that at any time after an order of reference to a master to take testimony and report the same or to take testimony and report his conclusions, the court shall, on the application of any party, fix a time within which each party shall close his proofs in chief and in rebuttal. Appellants say that the chancellor violated this rule to their detriment when he decided to hear only the matter of attorneys' fees which came on before him on the preliminary report of the master and not to await the incoming of the full report of the master on the merits of the case under the general order of reference entered on April 6, 1954. We believe that our



discussion on the first point urged disposes of this point. In our opinion the chancellor did not abuse his discretion when he decided to award fees before the incoming of the full report of the master on the merits of the remaining issues. Appellants insist that the chancellor departed from the opinion and mandate on the former appeal by not proceeding to hear all the facts necessary to a determination of all the issues in the case and by proceeding, instead, to grant substantial attorneys' fees at an interlocutory stage of the case, particularly in view of the contrary specific directions of the mandate to withhold relief from the contingent remaindermen unless they substantiate their accusations against the widow. We are satisfied that the action of the chancellor in awarding fees was not contrary to the opinion or mandate of the Supreme Court.

Appellants state that the mandate contains nothing to preclude the widow both as life tenant and as trustee from asserting her lien for indemnity upon the shares of the remaindermen because their litigation has been unnecessarily burdensome and unduly protracted on account of their groundless claims and their prayers for relief contrary to the testator's will. In their briefs appellees concede that the order appealed from does not preclude the appellants from hereafter asserting any claim which they may have for allowance of fees or expenses in connection with the accounting phase of the case. We agree with the statement of these appellees that the record demonstrates that the assertion that the appellants will be



deprived of claims for additional compensation for services rendered in the accounting phase of the case, if they have any sustainable claim in this respect, is without foundation.

The appellants urge that the charges of the contingent remaindermen accusing the widow of mismanagement and waste as a basis for obtaining continuing supervision by the court over the trust and general administration in equity of the affairs of the trust are a palpable sham, which the contingent remaindermen have made no good faith effort to substantiate since the remand. We cannot pass on the charges of the contingent remaindermen accusing the widow of mismanagement and waste until that phase of the case has been passed upon by the chancellor. Appellants say that the chancellor erred in making an allowance of attorneys' fees to the attorneys. This contention is without merit because the order makes the allowance to the parties and merely directs that payment of the amounts will be made to the attorneys.

An examination of the record convinces us that the master's findings and conclusions and the order of court putting them into effect are based upon an agreement openly entered into between the parties to the litigation in which the allowances requested by the various parties were substantially reduced. The settlement embodied in the order was based upon valuable consideration to Mrs. Barnhart and the trustees as well as to the collateral relatives. Appellants do not claim that the settlement was the result of fraud. Mrs. Barnhart testified that she "did not understand"



-14-

the agreement in the master's report. Unilateral misunderstanding on the part of one of the participants to a transaction does not vitiate an otherwise valid contract. At the time Mrs. Barnhart was represented by an experienced and capable lawyer. He explained the transaction to her and assured the chancellor that the matter was settled before the master. The transcript of the testimony shows that Mrs. Barnhart was permitted to make perfunctory proof of her claims and disbursements despite the fact that such claims were before the master. The attorneys who rendered services on her behalf were not called or cross-examined. All the parties agreed that she should be allowed \$50,000 on account of costs, expenses and attorneys' fees.

For the reasons stated the order of the Circuit Court of July 14, 1955, is affirmed.

Order affirmed.

Niemeyer, P. J., and Friend, J., concur.

It is a very common mistake to suppose that the  
only way to get the most out of a book is to read it  
from cover to cover. This is not true. The best way  
to get the most out of a book is to read it in a  
way that suits your own needs. For example, if you  
are interested in a particular subject, you should  
read the chapters on that subject first. If you are  
interested in the whole book, you should read it  
from cover to cover. If you are interested in a  
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first. If you are interested in a particular  
section, you should read that section first. If you  
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read that paragraph first. If you are interested in  
a particular sentence, you should read that sentence  
first. If you are interested in a particular word,  
you should read that word first. If you are  
interested in a particular letter, you should read  
that letter first. If you are interested in a  
particular syllable, you should read that syllable  
first. If you are interested in a particular  
vowel, you should read that vowel first. If you are  
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that consonant first. If you are interested in a  
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46967

ROBERT W. GEIERMANN,

Appellant,

v.

MARILYN M. GEIERMANN,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

12 1A<sup>2d</sup> 1-4

JUDGE FRIEND DELIVERED THE OPINI N OF THE COURT.

Plaintiff appeals from an order of February 14, 1956 overruling his motion to strike defendant's petition to vacate a decree of divorce entered in his favor more than a year prior to the filing of the petition to vacate; also from an order vacating the decree of divorce, as well as from a subsequent order denying his motion to set aside an award to defendant of temporary support and attorney's fees for the purpose of defending plaintiff's appeal from the original order of February 14, 1956.

There is substantially no dispute as to the facts. In November 1950 defendant was seriously injured and rendered mentally incompetent in an automobile accident while riding as a passenger with her husband, plaintiff herein. On his petition, the Probate Court of Cook County appointed him conservator, and in that capacity he settled her claims for personal injuries in the amount of \$10,000.00, which he received. He also collected a series of checks payable to defendant from her employer, representing semi-monthly payments of termination pay, as well as a series of checks from the Railroad Retirement

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Board representing payments under the Railroad Unemployment Insurance Act. Plaintiff endorsed defendant's name to all these checks, cashed them and kept the proceeds. In the aggregate he received over \$12,700.00 of defendant's money, for which he never made an accounting.

Following defendant's attempted suicide on July 15, 1953, plaintiff asked that his wife be declared mentally ill and incapable of managing and caring for her estate. Inasmuch as he refused to assume any responsibility for her care, her mother, Mrs. Marie Prokey, came to Chicago, Illinois from her home in North Hollywood, California, retained an attorney here, and through his efforts a court order was entered July 29, 1953 committing defendant to the care and custody of her mother rather than committing her to an institution. Plaintiff was present when this order was entered, agreed to it, and gave defendant's mother \$500.00 for defendant's transportation expenses to Los Angeles, California. Defendant lived with her mother in North Hollywood, California until they both returned to Chicago in September 1955, shortly prior to the hearing in this case.

While Mrs. Prokey was residing in North Hollywood, California with her daughter she corresponded with plaintiff in an effort to persuade him to assume the physical and financial responsibility of defendant's care and maintenance, but plaintiff refused, advising Mrs. Prokey that if she did not assume the care of defendant he would have her



-3-

committed to an institution. Thereafter Mrs. Prokey attempted, through an attorney in Chicago, to secure from plaintiff some of defendant's funds for the purpose of using them for her daughter's care and maintenance, but plaintiff refused to make any payments unless Mrs. Prokey agreed that plaintiff could divorce defendant. Subsequently, as a result of negotiations between Mrs. Prokey's attorney and one representing plaintiff, an agreement was entered into whereby plaintiff undertook to pay Mrs. Prokey \$5000.00 conditioned upon her promise that plaintiff could divorce defendant. A lump-sum settlement providing for the payment of \$5000.00 was thereupon forwarded to Mrs. Prokey and signed by defendant July 15, 1954. Plaintiff concedes that this agreement was signed by defendant while she was still under the County Court's order of commitment as an incompetent; she was not, as a matter of fact, restored until August 11, 1954.

Plaintiff's verified complaint for divorce was filed August 20, 1954, alleging as his sole ground that defendant had deserted him the year before, on July 29, 1953, the date of her commitment to the care of her mother as an incompetent. It is admitted by plaintiff that he had no grounds for divorce, and that the charge of desertion, based on the one-year period, was "erroneous."

Service of summons in the divorce proceeding was never made or attempted on defendant, although plaintiff knew her address, but on October 4, 1954, after the divorce decree had been entered, summons was returned by the sheriff

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"not found." Mrs. Prokey's Chicago attorney entered his appearance for defendant, signed an answer in her behalf and stipulated that the matter be heard as a default. At no time did he receive defendant's authorization to appear as her attorney in a divorce proceeding, nor did he ever advise her or Mrs. Prokey that a divorce complaint had been filed against her. He testified that defendant did not hire him, that his only authorization was Mrs. Prokey's request during the time of defendant's incompetency that he attempt to secure funds from plaintiff for defendant's support. The first information that Mrs. Prokey received that plaintiff had divorced defendant was more than thirty days after the entry of the decree when a certified copy thereof was forwarded to Los Angeles. Counsel received no fees from either defendant or Mrs. Prokey for his services in the divorce hearing; he was paid by plaintiff.

When the matter was heard on September 9, 1954, plaintiff, his brother-in-law and another witness, all testified that defendant had deserted plaintiff on July 29, 1953, the date of her commitment as an incompetent by the County Court. The chancellor in this proceeding found that the testimony of two of these witnesses was false, and that they knew on the date of their testimony that defendant had been committed by the County Court as an incompetent to the care of her mother and was residing with her in California at the time. On September 18, 1954, five days after the decree for divorce was entered, plaintiff remarried.

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The \$5000.00 lump settlement was never fully carried out. At various times, from October 21, 1954 until the filing of the petition to vacate, plaintiff's counsel transmitted to the counsel retained by Mrs. Prokey a total of \$1700.00 in installments which were forwarded to Mrs. Prokey. From this sum which was deposited in Mrs. Prokey's account she gave defendant spending money. Defendant has no money of her own, has not been able to work since the accident in 1950; she does not travel alone, has a speech defect, is extremely nervous, incoherent, and has no realization of time.

By order of February 14, 1956, the court, in the instant proceeding, found that defendant was diligent in protecting her interest after she was advised of the entry of the divorce decree and was not guilty of laches. The chancellor ordered that the decree be set aside, and he found that the property-settlement agreement signed by defendant during her incompetency was void. Subsequently, on May 23, 1956, after a rule to show cause had been entered against plaintiff, his attorney turned over to defendant the balance of \$3300.00 in his possession to apply on the support payments, pending an appeal, as provided in the order of February 14, 1956 vacating the decree, but plaintiff made no payments of any kind to defendant, either as support money or as a return to defendant of her funds still in his possession. Substantially all the foregoing findings were made by the chancellor or appear of record.

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WORTH OF THE NEW INVESTMENT QUOTED AS 50,000,000 SHS

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U.S. DEPARTMENT OF JUSTICE

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1. The value of a property shall be determined as follows:

There is no significant difference between the two groups with respect to

5. The above information was obtained from a confidential source who has provided reliable information in the past.

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1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler and Sponholz (1980).

*Journal of Interpersonal Violence* 26(10) 1978-1997  
© The Author(s) 2011

As the principal ground for reversal, plaintiff argues that the court was without jurisdiction to vacate the decree entered more than thirty days prior to the motion to vacate. However, to revert to the findings of fact of the chancellor and the evidence which amply sustains these findings, it appears that the court that originally entered the decree lacked jurisdiction to do so. There was no service of summons on defendant, although plaintiff well knew her address. Summons was returned "not found," and the appearance, answer and stipulation to hear the divorce case as a default matter were made by an attorney not employed by defendant; she was not represented by counsel of her choosing. The sole authority of the Chicago attorney to act came from defendant's mother, Mrs. Prokey, while defendant was legally incompetent and in her mother's care. After defendant was restored, she at no time authorized this attorney to act for her, nor did he ever advise her that he was going to enter her appearance and answer in the divorce proceeding. Under the circumstances, we think the chancellor properly held the decree of divorce void for want of jurisdiction.

The decisions in Illinois are in accord in holding that a party may at any time attack the validity of a judgment entered in a proceeding in which he was neither served with summons nor voluntarily entered his appearance. Anderson v. Hawhe, 115 Ill. 33; Jacobson v. Ashkinaze, 337 Ill. 141; Scharlau v. Lombard State Bank, 278 Ill. App. 504. In Barnard v. Michael, 392 Ill. 130,



-7-

the court had occasion to construe An Act in relation to final judgments, decrees and orders of courts of record in criminal and civil proceedings and the power to modify, vacate or set aside the same (Ill. Rev. Stat. 1955, ch. 77, sec. 82 et seq.) and stated: "The rule now is that a judgment or decree cannot be set aside by the court in which it was entered after the expiration of thirty days following the entry thereof, with an exception to the rule which is, now the same as formerly, that a court may entertain an application to vacate its void judgments or orders at any time and the thirty-day limitation does not apply. A judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally." See also Howard v. Howard, 304 Ill. App. 637.

It is further urged by plaintiff that defendant ratified the actions taken by the Chicago attorney retained by her mother in that he filed her appearance and represented her in the default divorce proceedings. The chancellor held otherwise, and we are convinced that his finding is amply supported by the evidence adduced upon the hearing of the petition to vacate the decree.

Lastly, it is urged by plaintiff that the doctrine of estoppel<sup>operates</sup> to protect him in the fraud he perpetrated on the court and on the defendant. Friend v.

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Northern Trust Co., 314 Ill. App. 596, and Anderson v. Anderson, 4 Ill. App. 2d 330, do not sustain this contention. In Meyer v. Meyer, 328 Ill. App. 408, wherein a divorce decree was also fraudulently obtained by the husband, the decree was collaterally attacked by the wife eighteen months after its entry. The differences between the circumstances of the instant proceeding and the authorities cited by plaintiff here are well pointed out in the second Meyer opinion (Meyer v. Meyer, 333 Ill. App. 450): "Illinois decisions are uniformly to the effect that a void judgment or order may be vacated at any time and that the doctrines of laches and estoppel do not apply." We had occasion to reject the defense of estoppel in Riddlesbarger v. Riddlesbarger, 324 Ill. App. 176, which, like the Meyer case, is similar to the instant proceeding. In the Riddlesbarger case the husband fraudulently obtained a divorce decree in a court that did not have jurisdiction. Although the wife was present in the courtroom during the hearing, she was coerced by her husband not to raise any defense to the complaint. A property settlement which the husband had forced the wife to sign prior to the divorce decree was also incorporated in the decree. Ten years later the wife collaterally attacked the decree; her husband defended on the premise that inasmuch as she had accepted benefits from the decree and had waited ten years to institute suit, she was estopped from challenging the decree. The opinion pertinently observed that "it has been often stated that the doctrine of estoppel is called into

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being for the prevention of fraud, and that it should never be exercised in aid of fraud." Although plaintiff appeals, inter alia, from the order of April 13, 1956, denying his motion to vacate a prior order of April 3, 1956 awarding defendant temporary support and attorney's fees to defend plaintiff's appeal from the original order of February 14, 1956, he does not argue the point in his brief. However, the award was proper, as has frequently been held. See Buehler v. Buehler, 313 Ill. App. 264 (Abst.).

For the reasons indicated, we are of opinion that the orders of the Superior Court from which plaintiff appeals were in all respects proper and are therefore affirmed.

AFFIRMED.

NIEMEYER, P. J., and BURKE, J., CONCUR.

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 system is not a simple one, but a  
 complex one, involving many factors  
 which are not yet fully understood.  
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In the Matter of the Estate of  
Ida Sneider, Deceased.

JULIUS SNEIDER, Administrator of  
the Estate of Ida Sneider, Deceased,

Appellee,

v.

Sallie Schwartz and Mary Snyder,

Appellants.

12 I.A. 485

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

The petitioner, Julius Sneider, administrator of the estate of Ida Sneider, deceased, filed in the Probate Court of Cook County his petition against Sallie Schwartz, Mary Snyder and other respondents for citation to recover property and discover information. Hearing in the Probate Court resulted in the discharge of all respondents. Petitioner appealed to the Circuit Court where the cause was tried by jury. In the course of the trial several respondents were dismissed, and the cause was finally submitted to the jury as to Sallie Schwartz, Mary Snyder and Max Snyder. Verdicts were returned finding that Sallie Schwartz had withheld the sum of \$2037.50 from the estate of Ida Sneider, that Mary Snyder had withheld the sum of \$500.00, and that Max Snyder had no monies or property belonging to the estate. Motions for judgment notwithstanding the verdict or, in the alternative, for a new trial, were filed by the losing respondents and overruled.



Judgment was entered against them upon the verdicts, and Max Snyder was dismissed from the proceeding. Sallie Schwartz and Mary Snyder have prosecuted this appeal.

The appealing respondents are sisters of the deceased and sisters-in-law of petitioner, Julius Sneider. In October 1938 deceased opened an individual savings account with the First National Bank of Chicago which continued in her name until July 11, 1944, when it was changed to a joint account with the right of survivorship in the name of the deceased and the respondent Sallie Schwartz, under an agreement on the form of the First National Bank, consisting of two parts, one part providing as follows: "The Undersigned hereby agree to the By-Laws, Rules and Regulations governing the Savings Department of THE FIRST NATIONAL BANK OF CHICAGO, and further agree that all deposits in this account, or any part thereof, or any interest or dividend thereon, may be paid to any one of the undersigned, whether the other or others be living or not, on the receipt or acquittance of any of the undersigned, intending hereby to create a joint tenancy account with right of survivorship"; and the second part providing: "The undersigned hereby agree that the present deposit and all future deposits in this Account No. 1249201, or any part thereof or dividend thereon, may be paid to any one of the undersigned whether the other or others be living or not, or on the receipt or acquittance of any one of the undersigned."



At the time the joint account was created the balance on deposit placed there by deceased was \$3010.50. Thereafter the amount was increased to \$5037.50, which was the balance at the time of Ida Sneider's death. Sallie Schwartz claims to have contributed approximately \$1000.00 of the additional amount. From the time of the creation of the joint account until 1947, when Sallie Schwartz moved to Benton, Illinois, the passbook for the account was in her possession, and from 1947 to the date of the death of Ida Sneider on April 18, 1952, both she and Sallie Schwartz had the passbook at times, but when Ida Sneider died it was in the possession of Sallie Schwartz.

In October 1936 the respondent Mary Snyder opened an individual savings account in the Lake Shore Trust and Savings Bank of Chicago which later became the Lake Shore National Bank of Chicago. On November 29, 1948 this became a joint account between the respondent Mary Snyder and the deceased by virtue of an agreement or signature card signed by both parties. The balance in the account at the time of the execution of the joint agreement was \$619.46, and at the time of Ida Sneider's death was \$476.95.

On January 25, 1943 Mary Snyder and Max Snyder, a respondent discharged by order of the court upon verdict of the jury, rented a safety deposit box in the Continental Illinois Savings Deposit Company which was frequently entered, according to the records of the deposit company, during the year 1952. Mary Snyder and Sallie Schwartz had other savings accounts, but in none of these did the deceased have any interest.





The deceased was married to the petitioner August 1, 1936 and lived with him until the date of her death, April 18, 1952, except for a two-year period from 1943 to 1945 when he was in the armed services. She died of leukemia from which she had been suffering since 1945. A son Ronald was born to her and petitioner in October 1944.

On April 24, 1952, six days after Ida Sneider's death, Sallie Schwartz withdrew from the account in the First National Bank the entire balance of \$5037.50 and redeposited that sum in a new account wherein she and her sister Mary Snyder, as joint tenants, were named as owners of the account. Five days later, April 29, 1952, this balance was withdrawn by sight draft payable to the Bank of Benton at Benton, Illinois, where it was deposited, together with the balance withdrawn in a similar manner in the joint account of Mary Snyder and Ida Sneider in the Lake Shore National Bank, in a new account in the Bank of Benton in the names of Mary Snyder and Sallie Schwartz.

Following the death of Ida Sneider, respondents lived in the Sneider home during the customary week of mourning. At the end of that week, all the relatives of the deceased being present, a meeting was held in the family home at the instance of the petitioner who claimed that the sisters and brother of the deceased had in their possession monies or property amounting to approximately \$15,000.00 belonging to the deceased, or which she had given



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to them to hold for her. This claim was denied by all the respondents, and particularly by Sallie Schwartz and Mary Snyder, but as a result of this conference Sallie Schwartz offered to pay the sum of \$3000.00 in settlement of all disputes out of which the sum of \$500.00 was to be paid to Mary Snyder for her nursing services to the deceased. The offer was accepted by petitioner, and thereafter the sum of \$2500.00 was paid by Sallie Schwartz to the petitioner, Julius Sneider, and a release acknowledging the receipt of \$3000.00 in full settlement of all claims against the sisters and brother of the deceased for monies or property claimed to have been delivered to them by her during her lifetime was executed by petitioner in the presence of his attorney. At the same time, a release executed by Mary Snyder acknowledging the release of all her claims against the estate was delivered to petitioner.

The rule in Illinois pertaining to joint bank accounts is now well established. Under the earlier decisions the courts of this state held that the rights of the surviving joint tenant were determined by the contract itself. However, in In re Estate of Schneider, 6 Ill. 2d 180, the Supreme Court decided, apparently for the first time, that the facts and circumstances surrounding the creation of a joint bank account and the happenings pertaining thereto may be inquired into for the purpose of aiding the court to ascertain the intention of the parties. In that case the surviving joint tenant admitted upon trial that the deceased had stated to him that he, the deceased,



wanted his name on the account so that in case he became ill the surviving joint tenant could obtain the funds as a convenience to the deceased. In passing on the situation the court said: "To establish a gift, the proof must be clear and convincing, (People v. Polhemus, 367 Ill. 185; Rothwell v. Taylor, 303 Ill. 226,) and the burden is upon the alleged donee to establish the existence of a donative intent. (Bolton v. Bolton, 306 Ill. 473.) The decisions of this court relied on by appellant [joint depositor with deceased] go no further than to indicate that the deposit agreement tends to show a donative intent on the part of the original owner of the funds, and that the intention so manifested, in the absence of contrary evidence, is sufficient to establish ownership in the survivor by virtue of the contract upon the death of the original owner. The form of the agreement, however, is not conclusive as to the intention of the depositors between themselves." The same rule is enunciated in Nolan v. American Telephone and Telegraph Co., 326 Ill. App. 328. In consonance with this rule, it was incumbent upon petitioner here to show, by clear evidence, an absence on the part of the deceased of an intention at the time of the execution by her of the joint deposit agreement to make a gift to her sister Sallie Schwartz of the amount of money on deposit at that time. The competent evidence of record does not rebut the presumption of such a gift; rather, it seems to fortify it, for, after the execution of the joint-deposit agreement, both the deceased and the



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respondent Sallie Schwartz made additional deposits to the account. Facts relating to the joint account in the Lake Shore National Bank between the deceased and Mary Snyder are likewise favorable to that respondent inasmuch as all the monies in that account at the time of its creation belonged to that respondent.

The only evidence offered by petitioner tending in any way to rebut the presumption of a gift was concerned with two alleged declarations made by the deceased long after the execution by her of both deposit agreements. Both these declarations were made outside the presence of either of the respondents. The first was made in December 1951 to Samuel Shapiro, a friend of the Sneider couple, who stated that the deceased had told him she had "enough economic finances" for her child; the second declaration was made in April 1952 to Melvin Sneider, the brother of the petitioner, who testified that the deceased had said she had provided well for her son--that she had accumulated at least \$15,000.00 which her brother and sisters were holding, under instructions, for the child. Both these declarations were admitted over objection. In passing upon similar evidence offered in connection with an attempt to overcome the presumption of a gift, the court held, in Houdek v. Ehrenberger, 397 Ill. 62, that, since the conversations of the witnesses were not conducted in the presence of the defendant, her objections to the admission of such testimony were properly sustained; and in

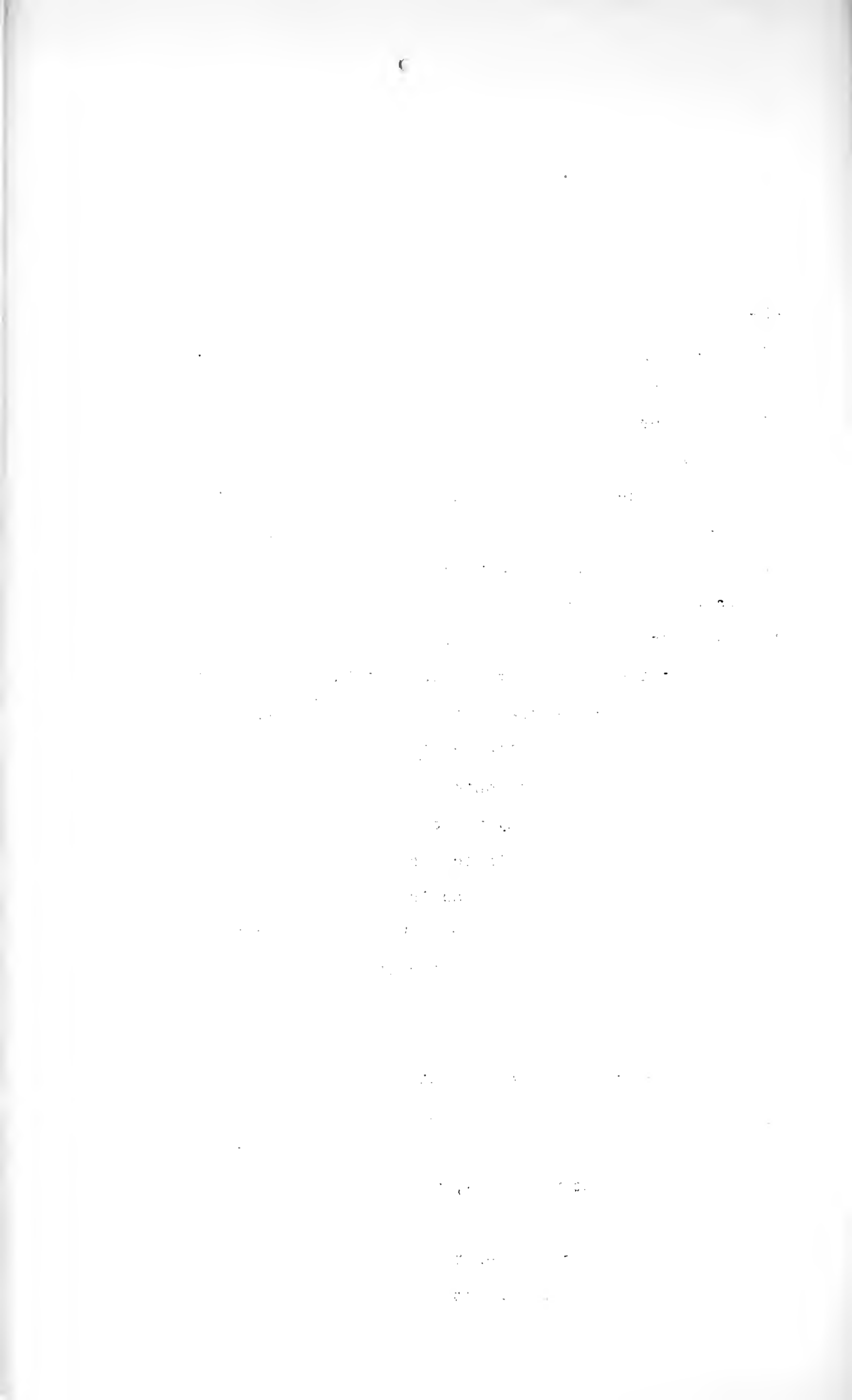




Nolan v. American Telephone and Telegraph Co. 326 Ill. App. 328, that prior or contemporaneous declarations of an alleged donor are admissible to show his intent. In the case before us, however, the conversations were not held in the presence of the respondents, and the declarations of the deceased were made long after the execution of the joint-deposit agreements. It is a fair inference that, in arriving at its verdict against respondents Schwartz and Snyder, the jury must have considered the inadmissible conversations inasmuch as there is no other direct evidence in the record which contradicts the presumption of an intended gift.

Petitioner relies on Creighton v. Elgin, 387 Ill. 592, to support his contention that Samuel Shapiro and Melvin Sneider's testimony was competent, but an examination of this decision clearly indicates that the question there presented was whether or not admissions against interest made by Lucretia Creighton during her lifetime with regard to the delivery of a deed executed by her and her husband, and also admissions made by her during her lifetime against her interest concerning the ownership of certain notes were relevant and competent when testified to by a third party not in interest. In that situation the court held that admissions or statements against interest, when proved by competent witnesses, were relevant and should be admitted.

Petitioner argues that certain exhibits introduced by him with respect to the various bank accounts,



wherein several of the respondents were named as depositors, were such as to give the jurors the right to infer that the customs and habits of the various depositors indicated that the deposits belonged to only one of the depositors, the name of the other depositor being added for convenience only. He seeks to fortify this contention by suggesting that on more than one occasion the respondents habitually added the name of a sister or **their brother to an account for** convenience only. We find no evidence to substantiate this contention.

Respondents also rely on the release executed by the petitioner as barring recovery. That release was never rescinded by petitioner, nor was the consideration of \$2500.00 actually received by him returned or offered to be returned prior to the commencement of the citation proceedings. We therefore hold that the release was binding upon the petitioner. See Babock v. Farwell, 245 Ill. 14, and Papke v. Hammond Co., 192 Ill. 631, for a discussion of the law applicable to this transaction.

For the reasons indicated, we are of opinion that the judgment against respondents entered by the Circuit Court should be reversed, and it is so ordered.

JUDGMENT REVERSED.

NIEMEYER, P. J., and BURKE, J., CONCUR.



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Appendix No. 12

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IN THE

APPELLATE COURT OF ILLINOIS

JAN 23 1957

SECOND DISTRICT

PAUL V. WUNDER, DOCKETED TERM, A. . 1956  
Clerk Appellate Court Second District

JAMES CARBONE, Administrator with  
the Will Annexed of the Estate of  
LIBORIO CARBONE, Deceased, JAMES  
CARBONE, Individually, SAMUEL  
CARBONE, DEAN GUTTILIA,  
FRANK CARBONE, MARY CARBONE,  
LEO CARBONE, ROSEMARY CARBONE,  
COLE, ANGELO CARBONE and A. C. CARBONE,  
CARBONE,

Plaintiffs-Appellants,

-vs-

ROBERT E. SPARKS,

Defendant-Appellee.

12 I.A. 486

Appeal from the  
Circuit Court of  
LaSalle County.

CROW, J.

This is a complaint in the nature of a bill of review, filed June 11, 1954, pursuant to leave, by James Carbone, administrator with the will annexed of the estate of Liborio Carbone, deceased, and others, as plaintiffs, being the devisees under the decedent's will, against Robert E. Sparks, defendant, seeking to review and set aside a decree of February 26, 1954 of the Circuit Court of LaSalle County in LIBORIO CARBONE v. ROBERT E. SPARKS, Gen. No. 45183, which, in substance, as we understand it, found that a lease of certain real estate in Streator of December 18, 1945 between Liborio Carbone, as lessor, and Robert E. Sparks, as lessee, was and is valid and in full force and effect, including the provisions thereof giving the lessee an option to purchase the real estate on certain terms, and which dismissed the plaintiff's suit for want of equity. The original com-

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plaint, as amended, of LIBORIO CARBONE in that suit, filed about 6 months after the execution of the lease of December 18, 1946, after setting forth preliminary allegations as to the property, the plaintiff's lack of knowledge of English, the circumstances as to the execution of an earlier lease of May 18, 1942 and of the December 18, 1946 lease, alleged, briefly, that the plaintiff lessor never intended to give the defendant lessee an option to purchase, the interpreter did not interpret the option provision to the plaintiff, (the plaintiff being allegedly unable to write, speak, read, or understand English); he executed it not knowing it contained such provision, the defendant knew the plaintiff did not intend to give an option, and after learning of such provision the plaintiff asked the defendant to cancel the lease and he refused. That original complaint, as amended, prayed the lease be declared null and void, and for general equitable relief. The defendant's answer to that original complaint, as amended, so far as material, denied the essential allegations. An earlier decree of February 28, 1952 entered in that suit, after a reference to a Special Master, extensive evidence, Special Master's Report, objections, exceptions, and hearing, found the option to purchase provisions of the lease to be null and void but the lease otherwise remained in full force and effect. However, on an appeal to this Court by the defendant Robert L. Sparks, we reversed and remanded, with directions to dismiss the suit for want of equity: CARBONE v. SPARKS (1952) 350 111. App. 56, (abst.), and a petition for leave to appeal was denied by the Supreme Court: 351 111. App. XV. The decree of February 26, 1954 was entered pursuant to that reversal and remandment. Liberio Carbone, the original plaintiff, died during the pendency of the litigation. Our opinion on the prior appeal may be referred to for a further statement of the factual back-

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ground of the controversy.

The present complaint is the nature of a bill of review seeking to review and set aside that decree of February 26, 1954 alleges, briefly, so far as material: the ownership of the real estate by Liberio Carbone; it is suitable for garage or other mercantile or industrial purposes; he leased it to the defendant Robert M. Sparks, May 18, 1942, a copy of that lease being attached; he was unable to read English; the defendant knew he could not speak, read, write, or understand English sufficiently to understand the leases; the defendant did not exercise the option to purchase for \$15,000.00 in that 1942 lease; the premises were worth \$15,000.00 May 18, 1942, and \$18,000 - \$20,000 December 18, 1945, and probably more when this complaint was filed; he made another lease to the defendant December 18, 1945, a copy of that lease being attached; the lessee's option to purchase provisions in the 1945 lease differed materially from the option provisions in the 1942 lease; the lessor had the 1945 lease interpreted to him in Italian by his son; the defendant represented to him through the interpreter that the option provisions of the 1945 lease were substantially the same as those of the 1942 lease except for dates; the defendant either fraudulently misrepresented to him through the interpreter that there was no material difference between the two leases, or, the defendant believed there was no substantial difference, the 1945 lease did not express the parties' intention, and is void for a mutual misunderstanding of fact or law; he filed his original complaint in CARLONE v. SPARKS, Gen. No. 45183, in which cause certain proceedings thereafter occurred, a copy of the abstract of the Appellate Court record filed in the Supreme Court, reflecting the proceedings, being attached,

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the Appellate Court reversed and remanded the original decree (of February 26, 1954), a copy of our prior opinion being attached, and the Supreme Court denied a petition for leave to appeal; a material factor in the Appellate Court's decision in the original case was the testimony of Attorney E. J. Davis; Mr. Davis has since, January 2, 1955, executed an affidavit, which is set out (and to which we shall later refer); Liborio Carbone has since died, testate, and the present plaintiffs' interests are set forth, a copy of the will being attached; the plaintiffs are entitled to review and relief from the decree of February 26, 1954 because of the newly discovered material evidence of the alleged facts stated by Mr. Davis, and because they may rescind the lease for mutual mistake of fact or law and the prior decree is not res judicata; the complaint prays that that decree be set aside, and the 1945 lease rescinded for fraud or mutual mistake of fact or law, and for general relief.

A motion by the defendant to dismiss was denied. The complaint was amended by attaching an affidavit of January 6, 1955 of Joseph F. Guerrini, the Special Master to whom the original suit was referred, (which need not be repeated in detail because Mr. Guerrini testified as a witness herein and his evidence will be later discussed). The answer of the defendant, so far as material, denied the essential allegations of the complaint, alleged that the same affidavit of Mr. Davis referred to in the present complaint was presented to the Appellate Court upon a petition for rehearing in the prior case and to the Supreme Court on the petition for leave to appeal, and alleged the decree of February 26, 1954 is final, binding, and conclusive. The plaintiffs' reply, so far as material, denies that decree is final and binding, because of the facts alleged in the complaint as amended. An amendment to the complaint also alleged that another material factor in the



Appellate Court's decision in the prior case was that the Special Master's report was adverse to the plaintiffs, and that the Special Master based his findings primarily on the testimony of Attorney Davis.

On December 19, 1955, after a hearing and presentation of evidence in open Court, a decree was entered that the lease of December 18, 1945 was in all respects valid, including the option to purchase, there is no newly discovered evidence or other cause to grant relief from the decree of February 25, 1954 and that decree is binding, and dismissing the present complaint for want of equity. The present appeal is from that decree.

The option to purchase provisions of the December 18, 1945 lease were, substantially, that the lessee had an option to purchase for \$13,000.00, but if the lessor had a bona fide offer to purchase from another party for \$13,000.00 or more he must submit that to the lessee, who then had 60 days to exercise his option, and if he did not, the option was cancelled and the lessor may then sell to the other party. The option to purchase provisions of the May 18, 1942 lease were, substantially, that the lessee had an option to purchase for \$13,000.00, but if the lessor had a bona fide offer to purchase from another party he must submit that to the lessee, who then had 30 days to meet such bona fide offer, and if he did not the lessor may sell to the other party.

In our former opinion we said, inter alia,: "At the time of the lease (of December 18, 1945) the garage building had a value of about \$13,000.00. This value, of course, was a matter of opinion and may not be mathematically correct. The defendant thereafter expended on the building approximately \$15,000.00 and its then value (at the time of the hearing in 1949 of the original suit, after the defendant's improvements) was approximately \$25,000. The nature and effect of the transaction is not such that fraud

The present and future of the world are in the hands of the people. The people are the only ones who can save the world from the hands of the few. The people are the only ones who can bring about a new world. The people are the only ones who can make the world a better place. The people are the only ones who can make the world a more just and more peaceful place. The people are the only ones who can make the world a more beautiful place. The people are the only ones who can make the world a more prosperous place. The people are the only ones who can make the world a more happy place. The people are the only ones who can make the world a more free place. The people are the only ones who can make the world a more democratic place. The people are the only ones who can make the world a more just and more peaceful place. The people are the only ones who can make the world a more beautiful place. The people are the only ones who can make the world a more prosperous place. The people are the only ones who can make the world a more happy place. The people are the only ones who can make the world a more free place. The people are the only ones who can make the world a more democratic place.

would be presumed because of great financial loss to the injured parties." (Paranetical matter added, for clarity.)

The affidavit of Mr. Davis which is set out in the present complaint need not be referred to in detail because Mr. Davis testified as a witness herein and his evidence will later be discussed, but it should be observed that when the prior case was pending in this Appellate Court we permitted the plaintiff, January 19, 1953, to amend his petition for rehearing by adding thereto that same affidavit, we later denied a rehearing April 8, 1953, and the same affidavit was in the abstract of the Appellate Court Record when the petition for leave to appeal was presented later to the Supreme Court. The affidavit, among other things, says, in substance, that Mr. Davis never read the 1945 lease thoroughly, relied on statements of the defendant and his attorney, states his understanding of the option provisions of the 1942 lease, says he did not understand and did not inform Liborio Carbone that the 1945 lease gave the lessee an unconditional option to purchase at \$13,000.00, says he did not discuss with Mr. Carbone the option provision of the 1945 lease, and says he first thoroughly read and understood that provision and its difference from the 1942 provision a day or two after December 18, 1945.

A bill of review is in the nature of a writ of error, and its object, as indicated by its name, is to have reviewed a decree in chancery rendered upon a former bill and to procure an alteration or reversal of the former decree by another trial of the issues upon which the case was first submitted; where based upon alleged newly discovered evidence, the evidence must be such as relates to a matter in issue upon the original hearing, must not be merely cumulative or of an impeaching character, must be

would be produced because of great financial loss to the

parties. (Enclosed herewith, for clarity.)

The following of the facts which are of the nature

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entirely new, and of a positive, convincing, and important, if not decisive and conclusive, character, and must be such as was not known to the complainant at the original hearing and as could not have been discovered and produced by the use of reasonable diligence, - the complainant's negligence in that respect, if any, barring any relief, -; the question is, will the alleged newly discovered facts in all probability produce a different result or finding; the allowance of such a bill is not a matter of right but rests in the sound discretion of the Court, the discretion to be exercised cautiously and sparingly and only under circumstances demonstrating it to be indispensable to the merits and justice of the cause; such bills of review are not favored, and the showing for the allowance thereof must be clear and substantial: WILLIAMS v. HALL (1921) 298 Ill. 75; ELIAS v. ELIAS (1899) 183 Ill. 132; CORRELY et al. v. CORRELY (1922) 304 Ill. 323; CLARK v. WAGNER (1914) 283 Ill. 199; J. B. LEBLANC et al. v. CHIL (1940) 375 Ill. 130; DAVIS et al. COHEN (1955) 5 Ill. App. (2) 517; COHEN v. WILLIAMS et al. (1933) 271 Ill. App. 312.

The witnesses for the plaintiffs on the hearing on the present complaint were: E. M. Davis, Joseph A. Guerrini, James Carbone, Allen Redmann, Ray Brian, and L. H. Griffin. There was no evidence presented by the defendant. If there was any newly discovered competent, material, relevant, and important evidence, within the rules applicable to a bill of review, as alleged by the plaintiffs, and which was not known to the plaintiff at the original hearing and could not have been discovered and produced by the use of reasonable diligence, it must be found in the testimony of those witnesses, or not at all.

Joseph T. Guerrini was the Special Master to whom the original suit by Liborio Carbone was referred, he took the testimony, and made a report, finding in favor of the defendant. He gave, on



this present hearing, his recollection of Mr. Davis' testimony on the trial of the original suit, and said his findings were primarily based upon Mr. Davis' testimony. The Report of the Special Master in that original suit does not state or indicate that his "findings were primarily based upon the testimony of Attorney E. M. Davis". It states, at the outset, "Findings of Special Master, dated January 4, 1951, from the pleadings, proof, and documentary evidence submitted in said cause, Special Master finds:", and at the beginning of each paragraph of the findings it states that, in general language: "I further find from the proof introduced herein," etc. Moreover, we entertain grave doubts as to the competency and admissibility of oral testimony at a latter date of one who has been a Special Master, discharging a judicial, official function by order of the Court, to the effect that his former findings in his official capacity were primarily based on the testimony of a particular witness. The report speaks for itself, we know of no authority by which it can be sought to be varied by parole testimony, and it does not support the witness' later parole testimony as to what his findings were primarily based upon. Beyond those considerations, the testimony of Mr. Guerrini did not relate to a matter in issue upon the original hearing, is, if anything, of a more or less impeaching character, is not positive, convincing, important, decisive, or conclusive, and, if true, does not in all probability produce a different result or finding.

James Carbone is one of the sons of Liborio Carbone, now deceased, a devisee under the decedent's will, the administrator with the will annexed of the estate, and one of the present plaintiffs. He said his father could hardly write his own name,

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could not read, his eyes were bad, he did not walk around town by himself, was 91 when he died, briefly traced some of his father's life history, and said his father handled the renting of the premises here involved and all business connected with it with the witness' help. This witness was a witness for the plaintiff at the trial of the original suit, but did not himself specifically testify to those facts. Regardless of other considerations, if his present testimony were relevant, material, important, and not otherwise covered, his present testimony was obviously not such as was unknown to the plaintiff at the original hearing, or as could not have been discovered and produced by the use of reasonable diligence, and his own negligence and that of the plaintiff in the original suit in not adducing such proof by and through that witness would, in itself, bar any relief on that account. Furthermore, Liborio Carbone, the plaintiff in the original suit, testified therein through an interpreter, referred to his own age, deficient eyesight, inability to read English, and traced some of his own life history; Dr. Davis testified therein that Liborio Carbone could not understand English; Robert E. Sparks, the defendant, testified therein he could not understand Liborio Carbone or his language; the Special Master's Report found, inter alia, that Liborio Carbone was 84 when the original complaint was filed, cannot write or read English, and speaks very little English; and in our prior opinion of this Court we referred to his age, said he spoke little English, did not understand it, did not speak it very well, had some property, and some business transactions, including those relating to these premises. Under the circumstances, so far as James Carbone's present testimony is concerned, beyond the fact of his own negligence and that of the plaintiff in the original suit being a bar, his testimony is merely cumulative, is not entirely new, is not important, decisive,

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or conclusive, and does not in all probability produce a different result or finding.

Allen Bedmann, Ray Grima, and M. H. Griffin were all in the real estate business, and they all expressed varying opinions as to the value of the property involved in December, 1943, - placing it, respectively, at \$24,000.00, \$20,000.00, and \$7,000.00 (for the lots alone), - and as to the value in 1954, - placing it, respectively, at \$40,000.00, \$35,000.00, and \$38,500.00. They all had lived and been in business in or near Streater for many years and there is nothing to indicate they were not known to the plaintiff in the original suit or not available to testify at the hearing thereof. Their testimony cannot be said to be such as was not known to the plaintiff at the original hearing or as could not have been discovered and produced by the use of reasonable diligence, - and the negligence of the plaintiff in the original suit in not adducing such proof by them, in itself, bars any relief on that account. Moreover, at the hearing in the original suit two other real estate brokers in Streater, of many years standing, testified for the plaintiff that the value in 1946 was about \$18,000.00 and, in 1949, was about \$25,000.00, and we commented on their testimony in our previous opinion. And the lack of experience of any of the present three witnesses with business property in Streater, the absence of detailed examination of this property by any of them, and the wide variations of opinions amongst them as well as between them and the other plaintiff's witnesses in the original suit and between them and the plaintiff's own views as expressed in the present complaint and in the complaint in the original suit do not contribute to the weight of their evidence. If their testimony really related to a material matter in issue upon the original hearing, which we doubt,

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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it was merely cumulative, of a more or less impeaching character, not entirely new, not positive, convincing, important, decisive, or conclusive, and does not in all probability produce a different result or finding.

E. M. Davis was the attorney for Liborio Carbone at the time of the lease of December 18, 1945. At, for some time before, and for some time after that time he was in the military service, but, as he testified in the original suit, he was home on leave. He had represented Mr. Carbone on various legal matters for some years, including the subject of the lease of May 18, 1942. He testified as a witness for the defendant at the trial of the original suit, and as a witness for the plaintiffs at the trial of the present suit. In our prior opinion on the appeal in the original suit we summarized Mr. Davis' then testimony for the defendant and his part in the transaction in this manner, and made these comments:

"The lease was drafted by Mr. Powers (R. A. Powers, attorney for the defendant) and after some minor changes was approved by Mr. Davis. Davis testified that from his conversations with Leo (Leo Carbone, a son of Liborio Carbone) he understood the lease as finally drafted was in conformity with the plaintiff's wishes. Prior to the evening of the execution of the lease, Davis had no conversation with the plaintiff concerning the same. After the proposed lease had been drafted it was agreed by Mr. Sparks, Mr. Davis and Leo Carbone that they would meet in the evening at the Carbone home to discuss the lease. Leo, in the meantime, had arranged for his sister, Agnes, and his brother, Frank, to be present. James Carbone was not notified of the meeting. The defendant, R. A. Powers, and Manley Davis went to the Carbone home. When they arrived, Liborio Carbone, Leo, Agnes, and Frank were there. - - - - -"

"After discussion of the terms of the lease, it is admitted that the plaintiff and the defendant both signed the same. What was said and done by the parties and those present prior to the signing of the lease is strenuously controverted by the testimony of those present. An evaluation of this testimony to determine its legal effect and credibility is necessary for the disposition of the issues. - - - - -"

"Manley Davis testified for the defendant that on the evening in question before all those present at the Carbone home, he read the lease paragraph by paragraph in English to Leo, who then spoke in Italian to his father; that they then discussed in Italian what



he had read; that after considerable discussion between Leo and his father, and at times Frank Carbone, the plaintiff and the defendant signed the lease; that the plaintiff wanted to pay him a fee; that he told him he could not take a fee but he accepted a present of \$5.00. He further testified that at the time Leo or Frank asked him, 'Does this mean that Sparks could buy the building?' He replied, 'Yes, it means he could buy it tomorrow morning if he wanted to'; that after this conversation there was some discussion in Italian between Leo and his father -- 'In fact, there was considerable discussion in Italian and occasionally an English word would crop out'; that the assumed part of the discussion between Leo Carbone and his father was concerning the option to purchase. The witness stated that he did not understand what was said in Italian. The witness further stated on cross examination that he did not know Leo had been in the Elgin State Hospital; that he had not discussed the lease with the plaintiff before the night the lease was signed; that he read the draft lease not more than twice; that he was representing the plaintiff more or less as a friend; that at the time he approved the lease he thought it was an advantageous situation for Mr. Carbone; that when he left the house on the night in question, he 'thought that Liborio Carbone fully understood the terms of that lease'; that on the night in question defendant explained the nature of the repairs he contemplated on the building. \* \* \* \* \*

\* \* \* \* \* "There is no evidence in the record disclosing that either Leo Carbone or Manley Davis was attempting to perpetrate a fraud on the plaintiff; there is no testimony even inferring that the plaintiff did not have full confidence in his former attorney and friend Manley Davis. Davis testified that he fully read the lease and explained to Frank in the presence of all the family that under the lease, defendant could buy the building at any time during the life of the lease. \* \* \* \* \*

\* \* \* \* \* "The testimony of the plaintiff's family that Davis, their friend and attorney, intentionally failed to read or that Leo failed to translate the option provision of the lease is so unreasonable and improbable that little credence should be given it. If this testimony were true, there is no evidence connecting the defendant with it." (Parenthetical matter added, for clarity.)

In the present suit, Mr. Davis, testifying for the plaintiffs on April 18, 1955, said the following things, in substance, which he did not testify about in the original suit: on December 18, 1945 he was an officer in the U. S. Naval Reserve, subsisting

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out of the hospital at Great Lakes; he had a coronary thrombosis attack while in the service in September, 1945, another attack in October, 1945, was in various military hospitals, coming to Great Lakes about Thanksgiving, 1945; he was in Great Lakes 2 or 3 weeks, then was permitted to subsist out, living with his family in Streator, returning to the hospital on week-ends, from October, 1945 to February, 1946 when he was discharged from the Naval Hospital; he was under treatment at the hospital and taking phenobarbital, theobromine, and morphine during that time; he had another attack in July, 1949, was in a Chicago hospital to the middle of August, had various narcotic medicines, was discharged, continued with some medicines, had another attack a few days later, was again hospitalized until about the last of October, 1949; he had various doctors; (he testified in the original suit on December 23, 1949); he was not asleep when he testified but says his mental processes were slowed down and he was not alert; when ambulatory from September, 1945 - February, 1946 he took phenobarbital and theobromine several times each day until discharged from the hospital in February, 1946; he's had no medication since May, 1950 except a dilator; he was a little drowsy while taking phenobarbital, but as time went on it had less effect on him; the conversations he had with Mr. Sparks (the defendant) preliminary to the new lease of December 18, 1945, were, as to the option clause, that the option would remain the same in the new lease as in a prior lease, except Mr. Davis agreed Mr. Sparks, the lessee, should have two months instead of 30 days to meet a bona fide offer of a third party proposed purchaser; he glanced through the draft of the new proposed lease, did not read it carefully, read it very carelessly, though

one of the hospital at Green Trench; he had a coronary thrombosis  
attack while in the service in September, 1945, another attack in  
October, 1946, was in various military hospitals, coming to Green  
Trench about Thanksgiving, 1948; he was in Green Trench 2 or 3 times,  
then was transferred to another unit, then to another unit, then to  
returning to the hospital at Green Trench, then to another unit, then to  
February, 1948 when he was transferred to another unit, then to  
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James, did not want to receive the case, then to another unit, then to another unit, then to another unit,

he had as much time as he wanted to read it, and Mr. Sparks did not attempt to conceal anything; at the Liborio Carbone home the evening of December 18, 1945 he did not understand the new lease had an unconditional option to the lessee to purchase for \$13,000, - he did not compare the option clauses then, - his opinion was that they were identical except for a 60 day instead of a 30 day period; he first compared the two option clauses and observed the differences a few days later in a conference with Liborio and James Carbone; he thought he knew what was going on when the lease was signed, but he has some doubts now; he presumes he knew what was going on when he first testified in the original suit, and he then told the truth to the best of his ability.

Except in those respects, Mr. Davis' testimony in the present suit was substantially the same, in its material aspects, as his testimony in the original suit. When he testified in the original suit on December 23, 1949 that was a little over 4 years after the crucial lease transaction of December 18, 1945 and was about 3½ years after the suit had been started. The Special Master's report was not filed until January 4, 1951, over a year after he had testified, and the Court's original decree of February 29, 1952 was over two years after he had testified. If all of his present testimony in the foregoing respects were competent, relevant, material, important, and true, there is nothing to indicate why during those extended periods of time the original plaintiff or present plaintiffs could not have discovered and produced the same by the use of reasonable diligence. Mr. Davis was evidently available for interviewing, for making any affidavits, or for giving a deposi-

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tion, and his historical associations with the original plaintiff and present plaintiffs would indicate he should have been friendly and cooperative in discussing the matters with them or their successor attorney at any reasonable time and place. His physical and mental condition would seem to be observable circumstances and if they were of significance at any important times the original plaintiff and present plaintiffs must have perceived them. It was known he was in the service and at home on leave. The original plaintiff and James Carbone, one of the present plaintiffs, certainly knew of their conference with Mr. Davis a few days after December 18, 1945, and, if (as he now says) he first compared the two option clauses and first observed the differences at that time, Liborio Carbone and James Carbone knew that circumstance and knew Mr. Davis' then views (if those were, as he now says, his then views) at that time, - years before he first testified, - and there is no apparent reason why he could not have been cross-examined at that time in that respect as well as in respect to his physical and mental condition if such had any significant importance. In fact, he was extensively cross-examined on behalf of the plaintiff in the original suit by competent counsel (who are also among plaintiffs' counsel here) and why the alleged facts in those respects (if true) as well as in all other above respects to which Mr. Davis now alludes in his present testimony were not or could not have been elicited on cross examination is not explained by the present plaintiffs. Regardless of other factors, the negligence of the plaintiff in the original suit in those respects and of the present plaintiffs bars any relief in this particular.

Further, whatever his physical condition may have been and whatever medications he then used his rather lengthy testimony,



as abstracted, in the original suit does not indicate his mental processes were slowed down or that he was not alert when the lease was made in 1945 and when he testified in 1949. Also, his present testimony as to his and Mr. Sparks' conversations on the option clause preliminary to the new lease, and his present testimony that he first compared the two option clauses in the 1945 and 1942 leases and observed the differences a few days after December 18, 1945 in a conference with Liborio and James Carbone, is largely in conflict with his previous testimony in those respects in the original suit, and we perceive no reason to believe his memory of oral conversations now, about 9½ years after the lease transaction, is better or more reliable than it was 4 years after that lease when he first testified. And, whether he read the lease carefully or carelessly, what he understood or did not understand as to the option provision, and what his opinion was on comparing that provision in the 1945 and 1942 leases respectively, all appear to be irrelevant and immaterial circumstances when he had as much time as he wanted to read it, asked for no further time, and when Mr. Sparks did not attempt to conceal anything. Some of Mr. Davis' present testimony does not relate to matters in issue in the original suit; some is merely of an impeaching character; most of it cannot be said to be entirely new; it is not, under the circumstances, positive, convincing, important, decisive, or conclusive; and it does not in all probability produce a different result or finding.

The allowance of this complaint in the nature of a bill of review being not a matter of right but resting in the sound discretion of the Court, and being not favored, we believe there was no abuse of discretion in dismissing it. It is not demonstrated to be

[illegible]

indispensable to the merits and justice of the cause. The present plaintiffs' showing is not clear and substantial.

The only cases cited by the plaintiffs on complaints in the nature of bills of review are: DAVIS et al. v. COHEN (1953) 5 Ill. App. (2) 517; BUSHNELL v. COOPER (1919) 289 Ill. 260; WOOD et al. v. FIRST NATIONAL BANK etc. et al. (1943) 323 Ill. 515; COSTELLO v. WARRISHER et al. (1955) 4 Ill. App. (2) 371; PEOPLE v. STERLING et al. (1934) 357 Ill. 354; and ROBBINS v. COMMERCIAL NATL. BK. etc. CO. et al. (1944) 324 Ill. App. 422. We have previously referred to DAVIS et al. v. COHEN, - in it a counterclaim in the nature of a bill of review was allowed where a decedent's will was discovered after a decree of partition had been entered. Its facts have no resemblance to those of the case at bar and it is useful and we have cited it only for the statement of principle that the granting of a bill of review is discretionary. In BUSHNELL v. COOPER, WOOD et al. vs. FIRST NATIONAL BANK etc. et al., and, in effect, in COSTELLO v. WARRISHER et al. the party or parties seeking to prosecute a bill of review were held barred by their own negligence. In PEOPLE v. STERLING et al. it was held a bill in the nature of a bill of review may not be brought in any court other than the one in which the original decree is entered, - a point not at all involved in the case at bar. And ROBBINS v. COMMERCIAL etc. involved a complaint in the nature of a bill of review to review a prior decree for alleged errors of law on its face, - a point not involved in the case at bar, - and, moreover, the appellate Court affirmed an order dismissing the complaint for want of equity.

As to the plaintiffs' argument that the lease of December 18, 1943 is void because of an alleged mutual mistake or misunderstanding of fact or law as to the option provisions, that they may



rescind it upon that ground, that the original suit was to rescind it for alleged fraud by the defendant, and the decree of February 26, 1954 therein is not res judicata of the present suit to rescind because of an alleged mutual mistake of fact or law, - the prayer for relief in the present complaint is that the decree of February 26, 1954 be set aside, the lease rescinded either for fraud or mutual mistake of fact or law, and for general relief. The prayer for relief in the complaint, as amended, in the original suit was, so far as material, that the lease be declared null and void, and for general relief. The alleged cause of action in the original suit was to have that lease determined to be null and void and rescinded or terminated. The alleged cause of action in the present suit (in addition to seeking to have the prior decree set aside) is the same, - to have that lease determined to be null and void and rescinded or terminated. The substance of many of the allegations of the complaint in the original suit may be found repeated in the present complaint. Some of the allegations of facts related to what might be urged to be a mutual mistake of fact seem, in fact, to be more adequately stated in the complaint in that original suit than in the present complaint. The phraseology "mutual mistake" or "fraud" is not actually used, as such, in the complaint in that original suit. The allegations of the present complaint may be found in substance in the complaint in the original suit, except for those peculiar to its character as a complaint in the nature of a bill of review, except for certain allegations as to the self evident differences in the option provisions of the 1945 and 1942 leases, except for certain allegations the defendant represented to Liborio Carbone the option provisions of the two leases were substantially the same (which would go to alleged fraud, on which, inter alia, we've heretofore found against the plaintiffs' views, and the present rec-

respected is upon that ground, that the order of the court is not to be  
in for alleged fraud by the defendant, and the order of the court is  
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ord does not alter that), except for uncontroverted allegations as to the present plaintiffs' interests as successors to Liberio Carbone, and except for certain legal conclusions and the specific use of the phraseology "mutual mistake" and "fraud".

We said in our prior opinion in the original suit, relative to the phases of the matter other than the plaintiffs' contention as to the defendant's fraud:

"The defendant contends that the plaintiff, who admittedly signed the lease, cannot escape liability on it because he was aged, illiterate, and did not understand the English language. The law is well established generally and in this State that ignorance of the contents of a written instrument does not relieve liability on it. In the absence of fraud it is presumed that one who signs a written instrument knows of its contents. This rule has been applied to the contracts of illiterate persons. It has been said that if they are unable to read or understand the instrument, they should have the contract read to them, and that a failure to obtain such a reading or explanation by others is such gross negligence that it will estop them from escaping liability on the grounds that they were ignorant of its contents. (12 Am. Juris. 628) This rule of law was followed in SILVA v. BROWN, 327 Ill. 80; WATKINS v. WACKENWICH, 282 Ill. App. 593; and SHULMAN v. ROSE, 284 Ill. 134.

There is no doubt that the plaintiff knew he was signing a lease. Its provisions had been explained to him by his son, Leo, in conjunction with his friend and attorney, Manley Davis, and he then voluntarily signed it. Under the law, outside of the question of fraud, which will be discussed later in this opinion, the plaintiff is bound by the lease even though he did not fully comprehend or understand it, according to the law as cited above."

And at another point shortly thereafter, we said that --- "It is evident that the basis of the relief sought in the complaint is on the grounds that the plaintiff who was illiterate had signed the lease (not) knowing what was in it." We then went on to discuss the contention as to fraud upon the part of the defendant and found such was not established. And towards the end of the opinion we then said: "We also find that even assuming that the plaintiff signed the lease without knowing what it contained or its legal effect, this does not vitiate the lease."

[illegible]

The first of these is the fact that the  
 government has been unable to raise the  
 necessary funds to meet its obligations.  
 This is due to a number of factors, including  
 the fact that the government has been unable to  
 collect the necessary taxes, and the fact that  
 the government has been unable to borrow the  
 necessary funds from the international market.  
 The second factor is the fact that the  
 government has been unable to implement the  
 necessary reforms to the economy. This has  
 led to a number of problems, including  
 inflation, unemployment, and a general  
 decline in the standard of living. The third  
 factor is the fact that the government has  
 been unable to maintain a stable political  
 environment. This has led to a number of  
 problems, including corruption, and a general  
 lack of confidence in the government.

The principle of res judicata is that where a cause of action has once been decided on the merits by a Court of competent jurisdiction such decision is conclusive as to the rights of the parties and their privies, and, as to them, is an absolute bar of a subsequent action involving the same claim, demand, or cause of action, and the principle, in such cases, extends to all grounds of recovery which might have been presented as well as to the questions actually decided in the first suit: HARLING CO. v. HARLING et al. (1933) 352 Ill. 417; CHICAGO etc. R. R. CO. v. ALQUIST et al. (1953) 415 Ill. 537.

Insofar as the present complaint constitutes, if it does, an effort to state an alleged cause of action for rescission of the lease of December 18, 1945 and to have it declared null and void because of an alleged mutual mistake of fact (in addition to being, as it purports to be, a complaint in the nature of a bill of review, - a somewhat anomalous situation) the cause of action, as such, in the original suit was the same as the cause of action, as such, in the present suit, the parties (or their privies) are the same, it would seem this alleged grounds of recovery of mutual mistake of fact was (inter alia) actually involved and decided in the original suit, but if it was not it is an alleged grounds of recovery which might have been presented therein, and hence the determination on appeal of the original suit and the decree of February 26, 1954, pursuant thereto, are res judicata as to the present complaint. We have considered the cases cited by the plaintiffs on alleged mistakes of fact, but, under the circumstances, they need not be discussed, - in none was involved a question of res judicate.

The decree of December 19, 1955 from which the present appeal was taken will, therefore, be affirmed.

Dove, R.J. concurs  
Eovaldi, J. concurs

AFFIRMED.

[illegible]

*[Faint handwritten notes at bottom]*

A  
Abstract

790

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

OCTOBER TERM, A. D. 1956

General No. 10096

Agenda No. 13

In the Matter of the Petition to Detach )  
Territory from Catlin Township High )  
School District No. 230, in Vermilion )  
County, Illinois, and to Annex same to )  
Adjoining District known as Jamaica )  
Consolidated High School District No. )  
237, in Vermilion and Edgar Counties, )  
Illinois. )

# # #

Catlin Township High School District )  
No. 230, in Vermilion County, Illinois, )  
et al., )

Plaintiffs-Appellants, )

vs. )

County Board of School Trustees of )  
Vermilion County, Illinois, an )  
Administrative Agency, et al., )

Defendants-Appellees. )

12 I.A. 487

Appeal from  
Circuit Court of  
Vermilion County

Roeth, J.

This case involves a detachment of certain territory from Catlin Township High School District No. 230, and annexation of that territory to Jamaica Consolidated High School District No. 237, as provided for in Article 4B, Sec. 4B-4 of Chap. 122 Ill. Rev. Stat. 1953. The County Board of School Trustees ordered the detachment

Abstract

APPLICANT CONTI

General No. 12000

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In the letter to the  
Director of the  
Federal Bureau of  
Investigation, dated  
April 11, 1960, the  
applicant stated that  
he was a member of the  
Communist Party, U.S.A.,  
and that he had been  
active in the Party for  
many years.

On April 11, 1960, the  
applicant was interviewed  
by the Director of the  
Federal Bureau of  
Investigation.

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from the Catlin district and annexation to the Jamaica district and this order was affirmed on administrative review by the Circuit Court of Vermillion County. The present appeal by the Catlin district followed.

From the record it appears, that the territory involved comprises about 6000 acres of land. All or the most part of it, was non high school territory prior to 1942. In that year, the territory, by action of the residents in conjunction with the action of the school authorities of the Catlin district, became a part of the Catlin district. The present proceeding was initiated by 77 land owners and legal voters in the territory. They constitute substantially all of the land owners and legal voters in said territory.

There is no dispute as to the basic facts pertaining to the two districts. Both are fully recognized by the State Superintendent of Public Instruction. Both have new high school buildings. The Catlin district has 123 students with 8 teachers and the Jamaica district has 182 students with 24 teachers. Currently, 6 students will be affected by the change. The 1953 assessed valuation of the Catlin district was in excess of \$8,000,000.00 and that of the Jamaica district was in excess of \$15,000,000.00. A change will take approximately \$1,200,000.00 of assessed valuation from the Catlin district and place it in the Jamaica district. The total tax rate





for all purposes in the Catlin district is 94% and that of the Jamaica district is \$1.20. Of these amounts the tax rate for educational purposes is 62% in the Jamaica district. The tax rate for educational purposes in the Catlin district is below that which could be levied without referendum and substantially below that which could be levied by referendum. The Catlin district does not have a hot lunch program and the Jamaica district does have such a program. Pupils attending grade school from the present Jamaica district together with those attending grade school in the territory involved go to one of two grade schools. Upon graduation part go to the Jamaica High School and part go to Catlin. The high school students from within this territory, now attending Catlin High School, are transported to school by bus whereas they are in close proximity to the Jamaica High School. These facts are all shown by the record and were before the County Board of School Trustees at the hearing.

On the hearing before the County Board of School Trustees four residents of the territory involved testified in support of the petition. Their testimony may be summarized thus: that the business, religious and social interests of the residents of the territory are in Fairmount, Jamaica or Sidell, towns all located in the Jamaica district; that the students have to take the school bus to Catlin whereas they would not have to do so if attending the Jamaica district; that a school with a hot lunch program is preferable; that they preferred to have their children attend the high school attended by

1966-70 - 1st Post Office, 1st Group, to Antioch Rd.

... ..

June 29, 1908

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their friends of grade school days and that to do otherwise was upsetting to the children. No residents of the territory appeared to oppose the petition.

The testimony in opposition to the petition was largely confined to the matter of the financial effect of the change on the Catlin district. It was pointed out that the Catlin district with their present tax rate had operated at a deficit for the prior year; that to take out of the district property having an assessed valuation of \$1,200,000.00 would greatly increase their financial plight; that to grant the petition would affect all the other high school students and those who might attend in the future.

On the basis of the record made before the County Board of School Trustees, it entered an order, which, after reciting that the Secretary of said Board of Trustees submitted maps showing the districts involved and a report of financial and educational conditions of the districts involved and the probable effects of the proposed changes, and that the Board of Trustees having heard the evidence as to the school needs and conditions of the territory in the area within and adjacent thereto and the ability of the districts affected to meet the standards prescribed by law, and having taken into consideration the division of funds and assets which will result from the change of boundaries, and having taken into consideration whether it is to the best interests of the schools of the area and the

their friends of grade school age, and it is not  
appearing to the children. It is not a  
to oppose the petition.

The testimony in opposition to the petition  
continued to the matter of the petition. It was  
Gallin district. It was stated that the petition  
their present tax rate is not sufficient to pay  
that to take out of the district a certain amount  
of \$1,200,000.00 which is not a small sum  
to grant the petition would result in a loss of  
and those who have agreed to the petition.

The petition is not a request for  
of school money, it is a request for  
the raising of additional money for the  
district. The petition is not a request for  
of the district. It is a request for  
change, and it is not a request for  
as to the school money. It is a request  
within a certain amount of time. It is a  
to read the petition. It is a request  
attention. It is a request for  
for the district. It is a request  
it is in the interest of the district.

The board of directors of the district  
appears to have all the necessary  
Robert H. [Signature]  
[Signature]  
[Signature]  
- 30 -

educational welfare of the pupils, and having heard witnesses and the argument of counsel, granted the petition to detach from the Catlin district and annex to the Jamaica district.

Counsel for appellant Catlin district makes two principal contentions, (1) that the order of the County Board of School Trustees is not supported by sufficient evidence and is contrary to the manifest weight of the evidence and (2) that there was no compliance with the mandatory statutory requirement of the filing of a map of the districts involved, and a report of the financial condition of the districts and the probable effect of the proposed change, as required by Sec. 4B-4 of Chap. 122, Ill. Rev. Stat. 1953.

In support of the second contention counsel for appellant relies upon Bellevue Realty Co. vs. School District No. 111, 7 Ill. App. 2d 196, 129 N.E. 2d 231. This case holds that the filing of maps and a report of the financial condition of the districts involved, is mandatory, and that the failure to do so is fatal to the Board's order. However, the holding in this case must be considered in the light of the situation there presented, as indicated by the following language of the court:

"In this case the record of proceedings before the County School Trustees fails to show that the Board was furnished with 'a report of financial and educational conditions of the districts involved and the probable effect of the proposed changes' as required by Paragraph 4B-4 of the School Code."

Such is not the factual situation in the case at bar. The record of the proceedings before the County Board of School Trustees in

educational welfare of the people; and having regard to the  
argument of counsel, I am of opinion that the  
District Judge was right in his decision.

Counsel for the appellant submitted that the

contract was, (1) that the appellant was not  
entitled to be appointed a District Judge, and  
the appellant was not entitled to be appointed a  
District Judge, and the appellant was not entitled  
to be appointed a District Judge, and the appellant  
was not entitled to be appointed a District Judge,  
as required by law. The appellant was not  
entitled to be appointed a District Judge.

It is submitted that the appellant was not

entitled to be appointed a District Judge.

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entitled to be appointed a District Judge.

the case at bar does show that at the commencement of the hearing the County Superintendent appeared and made the following statement:

"The assessed valuation of the Jamaica Consolidated High School District is \$15,695,446.00. The tax rate is a dollar and twenty cents. The assessed valuation of the Catlin Township High School District is \$8,025,138.00. The rate is ninety-four cents. Both high schools are recognized and I have an assessed valuation of the territory that's involved in the petition which is \$1,203,785.00.

As I said, the petition is in order and I have presented a map for you so that you may use it at your convenience."

Further, the witness Songer, called by appellant Catlin district, made geographical comparisons "by use of this chart" and then said, "That's all I want to say for the map. Before I lay this down is there any question on this map?" The witness Clark in testifying referred to a chart and demonstrated on it. The record further shows that the Board of School Trustees had before it a chart showing by comparison, the enrollment, number of teachers, pupil-teacher ratio, 1953 assessed valuation, educational tax rate and building tax rate of each district. It also had a chart before it showing as to each district 1954 assessed valuation, the 1954-55 enrollment, the assessed valuation per student, the total valuation if the territory is detached and annexed and the assessed valuation per student after detachment and annexation. From the foregoing we are of the opinion that the statutory requirements were complied with.





Counsel for appellant Catlin district finally contends that the order of the County Board of School Trustees is not supported by sufficient evidence and is contrary to the manifest weight of the evidence. Counsel for appellant relies principally upon Trico Community Unit School District #176 vs. County Board of School Trustees, 8 Ill. App. 2d 494, 131 N.E. 2d 829, whereas counsel for appellee Jamaica district cites Bridgport Township High School Dist. #3-12 vs. Shank et al, 7 Ill. App. 2d 183, 129 N.E. 2d 264, Stehl vs. County Board of School Trustees, 7 Ill. App. 2d 257, 129 N.E. 2d 297, Kinney vs. County Board of School Trustees, 7 Ill. App. 2d 286, 129 N.E. 2d 292, and Community Unit District #6 of Macon/County v. County Board of School Trustees of Sangamon County, 9 Ill. App. 2d 116, 132 N.E. 2d 584. There is no dearth of reported cases involving the contention that a decision of the County Board of School Trustees is against the manifest weight of evidence. We think that in determining the question the expressions of the Supreme Court of this state in two comparatively recent cases, namely, School District No. 79 vs. County Board of School Trustees, 4 Ill. 2d 533, 123 N.E. 2d 475, and Pritchett vs. County Board of School Trustees, 5 Ill. 2d 356, 125 N.E. 2d 476, should be kept in mind. In these cases the Supreme Court noted that the legislature may, with or without the consent of the inhabitants of a school district, or against their protests, take the school facilities of

Counsel for appellant herein filed timely motion

that the order of the County Board of School Trustees be set

supported by sufficient evidence, and is hereby set aside.

weight of the evidence, Counsel for appellant herein

upon Trico Community High School District v. Trico

School Trustees, 8 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

the Board of School Trustees, and the Board of School Trustees

appeals are hereby affirmed, and the Board of School Trustees

Board of School Trustees

Board of School Trustees

one district and vest them in other districts. The area of the district may be contracted or expanded, it may be divided, united in whole or in part with another district, and the district may be abolished. All this at the will of the legislature. The legislature, however, in keeping with its policy of catering to local self-government in school matters, has designated the County Board of School Trustees as the administrative agency for the purpose of hearing the expressions of local opinion relative to matters of detachment and annexation. In all matters concerning a change in school boundaries or annexation to or detachment from territory of an existing school district certain inequities to individual taxpayers will probably arise and disagreement over proposed changes may be present. However, the determination of these questions should be left to the administrative agency. This court took cognizance of these principles in what we regard as a well considered opinion, in Community Unit School District No. 6 of Macon/County and Christian vs. County Board of School Trustees of Sangamon County, supra. Leave to appeal in this case was subsequently denied by the Supreme Court. There we concluded:

"In the present case the Trustees have accepted the delegation of this legislative power and carried out its execution in accordance with statutory methods. It matters not that we might weigh the statutory facts differently or execute the power in another manner."

This court should not substitute its judgment for that of the County Board of School Trustees where the record reveals



sufficient evidence to support its order. We have detailed the salient facts presented to the Board at the hearing. It was in the best position to appraise the overall picture and consider all the facts. We cannot say that its order is against the manifest weight of the evidence.

Accordingly the judgment of the Circuit Court of Vermillion County is affirmed.

Affirmed.

Reynolds, P.J., and Carroll, J., concur.

11-11-61

sufficient evidence to support the charge. It is noted that the evidence presented to the Board of Directors is in the nature of a best position to appraise the overall picture and the facts. We cannot say that the evidence is sufficient to support the charge of the evidence.

Accordingly, the Board of Directors has

Verdict of the Board of Directors.

Respectfully,

Reynolds, P.J., and Carroll, J., consent.

The Board of Directors has

Respectfully, the Board of Directors has

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Respectfully, the Board of Directors has

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46945

CHRISTINE LANO,  
Appellee,

v.

YELLOW CAB COMPANY,  
a corporation,  
Appellant,

PAUL WILLIAMS,  
Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

12 I.A.<sup>2d</sup> 555

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION  
OF THE COURT.

Plaintiff was injured when a cab owned by defendant Yellow Cab Company, in which she was riding as a passenger, collided with another cab owned by defendant Paul Williams. Yellow Cab Company appeals from a verdict and judgment in plaintiff's favor against it and the other defendant, and from a verdict and judgment of not guilty in favor of defendant Paul Williams on a counterclaim filed by it. Appellant contends that the verdicts are against the manifest weight of the evidence. Its theory is that certain undisputed facts clearly show it was not guilty of negligence. Appellee Paul Williams filed no brief.

We have examined the record and the undisputed facts are that on the night of January 26, 1951, there was a collision at the intersection of Wolcott avenue and Monroe street in Chicago, between a Yellow Cab in which plaintiff was riding and an independent cab owned and operated by Paul Williams. It was snowing and the streets were very icy. Appellant's cab was driving in





-2-

an easterly direction on Monroe street and Williams' cab had been traveling in a southerly direction on Wolcott. There was a slow sign warning southbound traffic on Wolcott of the intersection with Monroe street.

All the other material facts, such as the speed of the vehicles prior to the accident, the position of the vehicles in the intersection prior to the moment of impact, and the position of the vehicles after the impact, are disputed. To cite but a few examples, the plaintiff testified that the Yellow Cab was going thirty miles per hour just prior to the accident. The driver of the Yellow Cab said he was going five to ten miles per hour. Williams testified the Yellow Cab was going twenty miles per hour. Plaintiff testified the Williams' cab was in the intersection first. Williams also said he was the first one in the intersection. The Yellow Cab driver said he was in the intersection first. There are discrepancies in the testimony of the driver of the Yellow Cab on direct and cross-examination.

The law is well established in this State that on appeal this court will not substitute its judgment as to the weight to be given the testimony and as to credibility of the witnesses for that of the trial court which heard and saw them. When the evidence is as contradictory as it is in this case, we cannot say after examination of the record that the findings of the jury are against the manifest weight of the evidence.

The judgment of the trial court is affirmed.

Judgment affirmed.

Schwartz and McCormick, JJ., concur.



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46910

JOSEPH MINGA and RAYMOND DESMORE,  
Appellants,

v.

JACK COLE CO., INC., a corporation,  
and SZETTY H. McGUIRE,  
Appellees.

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12 I.A. 556

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the defendants entered in the Circuit Court of Cook County. The action was brought by the plaintiffs, Joseph Minga and Raymond Desmore, to recover damages for injuries sustained by them when a Chicago Transit Authority streetcar on which they were the conductor and motorman, respectively, collided with a truck owned by defendant Jack Cole Co., Inc., and operated by defendant Szetty H. McGuire. A trial was had before a jury and a verdict rendered in behalf of the defendants.

The plaintiffs contend that the verdict was against the manifest weight of the evidence; that the court admitted improper evidence in behalf of the defendants; that the argument of counsel for defendants to the jury was improper; and that the court erred in instructing the jury at the request of the defendants.

The collision occurred on July 3, 1953 when the plaintiffs Minga and Desmore, as conductor and motorman respectively, were proceeding south on State street on a Chicago Transit Authority streetcar. At the time of the occurrence the two plaintiffs were alone in the car. The truck, owned by the defendant Jack Cole Co., Inc., hereafter referred to as "Cole," and driven by defendant McGuire

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south on State street, had run into a viaduct abutment and, while standing across the streetcar tracks, was hit by the streetcar.

The plaintiffs complain that the court erred in permitting the defendant McGuire to testify as to the nature and extent of injuries allegedly received by him in the collision. No counterclaim had been filed by McGuire in the instant suit, and his injuries were not in issue. On his direct examination he had stated that "the impact to the rear of my trailer knocked me kind of unconscious when it hit me. I was hurt, leg broke." Counsel for the plaintiffs interposed an objection, which the court overruled, and the witness then over objection testified, in response to a question of his attorney with reference to the extent of his injuries: "On both sides of the nose, all the way across; cut all the way across and broke into here (indicating) I was injured on the side of my face (indicating) the corner of my left eye, leg was broken, right leg below my knee. I have to use a brace to walk at the present time, a metal brace on my right leg. It extends from the bottom of my heel approximately to my hip. I have that brace on now." The witness was then asked as to whether or not he had a lawsuit pending to recover for the damages which he had sustained. He answered "yes," and counsel for the plaintiffs objected to this question. After a discussion between counsel and the court the court apparently reserved his ruling. No subsequent motion to strike the evidence was made by the plaintiffs, nor did they request



an instruction that the jury disregard the evidence. By such failure they waived whatever right they had to urge error. As to the statement of the witness describing his injuries, the objection of the plaintiffs, which was overruled by the court, properly preserved their right to here urge that there was error in the trial court's ruling. There was no issue before the court which this testimony could in any way tend to prove. It was entirely immaterial, and the description of the injuries suffered by the defendant McGuire could have awakened the sympathy of the jury and so was prejudicial. The admission of the evidence over objection was error, and the error was further compounded by the statement made by counsel for defendants in his closing argument that McGuire "came out of this case with considerably more injury than anybody else," in spite of the fact that the court sustained plaintiffs' objection to the argument.

The plaintiffs also object to certain of the instructions given by the court at the request of the defendants. At the request of the defendants the court gave six instructions dealing with the subject of plaintiffs' contributory negligence, four of which concluded with a direction to find for the defendants. One of the instructions was with reference to the contributory negligence of Desmore and concluded with the statement that if the jury found that he was guilty of contributory negligence he cannot recover from the defendants whether or not they also were guilty of negligence. Another in substance was a repetition of the first and concluded in





substantially the same manner. A third instruction dealt with the contributory negligence of both plaintiffs, and concluded that if either one <sup>was</sup> guilty of contributory negligence such plaintiff could not recover. As has been pointed out by this court in case after case, the giving of an inordinate number of instructions peremptory in form and containing the phrase "you should find the defendant not guilty," or its equivalent, has been repeatedly condemned, and we have stated that with a little care the instructions could be so drawn as not to require the court to constantly repeat the phrase objected to. Forslund v. Chicago Transit Authority, 9 Ill. App.2d 290; Stone v. Warehouse & Terminal Cartage Co., 6 Ill. App.2d 229; Loucks v. Pierce, 341 Ill. App. 253; Alexander v. Sullivan, 334 Ill. App. 42; Baker v. Thompson, 337 Ill. App. 327. In this case there were four such instructions given, of which two were clearly repetitious and the third in substance covered the same ground. This was error.

It appears from the record that the collision occurred on July 3, 1953 between 4:19 and 4:30 a.m. the streetcar was traveling south on State street, a street which in the immediate vicinity of the accident was paved with brick and asphalt with two car tracks, one for northbound and one for southbound streetcars. Between 89th and 90th streets a railroad viaduct crosses it in an east-west direction. The viaduct was lighted with lights shining south in the southbound lane and north in the northbound lane. Desmore testified that the lights in the viaduct are directed down toward the street.



At a point about 80 feet north of the viaduct there is a slight jog in the street, and the southbound streetcar tracks angled to the right (west), and from north to south, beginning about 100 feet north of the viaduct, there is a slight decline.

Desmore testified that when he was 60 or 65 feet north of the viaduct the car was going at 10 to 12 miles an hour; that at that speed he could have stopped the car within about 18 or 20 feet, but he could not stop it in 12 feet; that when he was 60 to 65 feet north of the viaduct he saw, 10 to 12 feet in front of him, an object of a dirty color which looked to him like the right rear corner of a semi-truck, the back of which "was not lit up at all"; that as soon as he saw the object he put on his brakes and the collision occurred, the left front housing of the streetcar striking the right rear of the trailer. He also testified that up to the time of the collision, from 87th street south to the viaduct, he had seen no traffic in front of him; that the lights on his car were on and before the time when he was 10 to 12 feet away from the truck he could not see the silhouette of the trailer on the streetcar tracks. At the time of the collision Desmore was knocked unconscious. Minga, the conductor, corroborates the testimony of Desmore as to the speed of the streetcar. He did not see the accident, but afterwards got out of the streetcar and talked to the driver of the truck, who was calling for help. Minga testified that he asked the driver what happened and that the driver replied that he did not know, he was tired.

McGuire testified that the truck which he was driving



was a small type truck-trailer unit, the truck portion being 5 to 6 feet wide in front and wider in back, and the trailer being 7-1/2 to 8 feet wide. The combined length of the truck and trailer was about 42 feet. He stated that the truck was equipped with the following lights: five lights at the top of the trailer, two down about the middle, back of the trailer, two down at the bottom of the trailer, two reflectors, and one tail light which was below the body of the trailer. He also testified that he was employed by Cole; that he had brought a load of freight north to Kingsbury, Indiana, on July 2, 1953; that he stayed in Kingsbury between seven and eight hours, sleeping about three hours, and then went to Chicago, going to the Cole terminal around 89th street and California avenue; that he then went to bed at a hotel about 7:00 p.m. on July 2nd and got up about 3:00 on the morning of the 3rd; that he went to the terminal and started to drive his loaded truck back to Birmingham; that the lights were on but the front headlights were bad and shone only 8 or 10 feet in front of him; that he was going 15 or 20 miles an hour as he approached the viaduct driving south on State street; that a car was passing him on the right side of the tractor and turned into him; that he (McGuire) then turned left and hit the abutment of the viaduct; that at the time when the impact occurred he did not remember whether the rear lights of the trailer were on or off but stated that they were on before striking the viaduct. He was unable to identify the car or the number of persons it contained, but said it did not stop. He testi-



fied that he was not injured and attempted to get out of the cab of the truck, the door of which was jammed, and while he was attempting to push the door open, a minute and a half or two minutes later something struck him in the rear, drove the trailer up on the curb, and he was knocked unconscious.

A supervisor of the CTA, who had arrived at the scene of the accident at 4:35 a.m., testified that there were no lights whatsoever lit on the truck.

One Edward Shields, a witness for the defendants, testified that on July 3, 1953 he was a night watchman employed at a building then under construction which extended 75 or 80 feet north from the viaduct on the west side of State street. He had gone to work at 4:30 p.m. on July 2nd, and at about 4:00 or 4:06 a.m. on July 3rd he was on the sidewalk checking some flares which he had placed there. He stated that he was about in the middle of the building when a truck with a trailer attached passed him; that the trailer had lights on it; that a few minutes later the trailer crashed into the viaduct and the lights on the trailer remained lit; that a short time afterwards a streetcar passed him at a "top rate of speed" and crashed into the rear of the truck and apparently hit the trailer. He also testified that the speed of the streetcar was 40 to 45 miles an hour as it passed him. He saw the police arrive but he did not give them his name or tell them that he saw the accident. On cross-examination Shields denied that he previously had said he had not seen the accident. A written statement was presented to him which purported to bear his signature. In the statement





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were the following questions and answers:

"Question: Did you see the accident? Answer: No. Question: Was the car standing or moving? If moving, how fast? Answer: I don't know. Question: Tell in your own way how the accident happened. Answer: I was on guard as watchman and I did not see the accident occur but only saw it after it occurred. Question: In your opinion who was to blame for the accident? Answer: I don't know."

One Clark, a CTA investigator, testified that on the morning of July 3, 1953 he took the statement from Shields. He identified plaintiffs' exhibit as the statement and testified that Shields had signed the document; that he had asked Shields the questions printed on the statement and wrote down in the presence of Shields the substance of the answers which Shields gave him; that Shields then read it over and signed it.

Gash, a CTA employee, testified that on December 7, 1954 he interviewed Shields and asked him if he had seen the accident, and that Shields replied that he had not.

O. W. Olson, Jr., an attorney, testified that on December 7, 1954 he asked Shields what, if anything, he knew about the accident and Shields told him he did not know anything, that he had not seen it.

Shields denied that he had told Clark or Gash he had not seen the accident.

Shields wrote his signature on a blank piece of

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paper, and also identified eight checks as having been indorsed by him. Herbert J. Walter, a handwriting expert, testified that the sample signature written in open court, the indorsements on the checks, and the disputed signature of Shields on the statement were written by the same person.

Without the testimony of Shields in the record, Desmore would have been the only eyewitness to the accident who testified.

In order to succeed in their lawsuit the plaintiffs must prove that the defendants were negligent and that plaintiffs were free from contributory negligence. The jury returned a general verdict. From the record we cannot determine what credence the jury gave to the testimony of Shields, nor how much his testimony influenced them in arriving at their verdict. When prior contradictory statements made by a witness are introduced for the purpose of impeachment, the jury may draw an inference therefrom that the witness was either mistaken or corrupt in his present testimony. Admitted signatures of Shields were received in evidence by the trial court for the purpose of comparison. A handwriting expert testified that it was his opinion that the disputed signature on Shields's statement was written by the same person who wrote the admitted signatures. Upon that testimony the court admitted the disputed document. In order to admit it, the court must necessarily have found that it had been signed by Shields. Shields, having been

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recalled, again categorically denied that the signature was his and denied that he had told anyone that he had not seen the accident. The disputed signature and the admitted signatures are reproduced in the abstract, and without professing to being handwriting experts they appear to us to have been written by the same person. The statement in evidence could have the effect of neutralizing the testimony of Shields that the streetcar immediately before the impact was traveling at a high rate of speed and that the truck was fully lighted in the rear. Then, too, there is the testimony of Clark, who took the statement from Shields, who testified that Shields had read over the statement and signed it. Gash, an employee of the CTA, and Olson, an attorney, both testified without objection that Shields had told them that he had not seen the accident. Both of these statements would also tend to neutralize Shields's testimony. If the testimony of Shields was disregarded as it could have been, Desmore would have been the only eyewitness testifying.

The case was an extremely close one. It could be said that the verdict was balanced on a hairline. Under these circumstances we cannot say that the highly prejudicial and incompetent testimony of McGuire, improperly admitted, in which he described to an unwarranted extent the injuries he suffered at the time of the collision, did not influence the jury in reaching a verdict. In addition to this improper evidence there were four repetitious peremptory instructions



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asking for a finding in favor of the defendants, together with improper argument on the part of the defendants' counsel, in which he again brought into the case the entirely immaterial question of McGuire's injuries. These errors were prejudicial to the plaintiffs and it cannot be said that without them the jury would not have reached another result. The plaintiffs should have been granted a new trial.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

Judgment reversed and  
cause remanded.

Robson, P. J., and Schwartz, J., concur.

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46948

SEARS, ROEBUCK & COMPANY,  
a corporation,  
Appellee,

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

v.

EDWARD H. SIGMAN and  
IRENE E. SIGMAN,

Appellants.

12 I.A. 556

JUDGE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment by default for \$596.38, the amount claimed for installation of an oil burner. More than 30 days after the entry of the judgment defendants filed a petition to vacate the default judgment and to quash service of summons. No answer or counter-affidavit was filed to that petition. The court denied the petition, and from that order defendants appeal.

When the matter first came up the court stated in substance that he assumed there was no service, but as no defense on the merits was stated in the petition, he would deny the motion to vacate the judgment, and he fixed the appeal bond at \$1500. Then, upon the suggestion of attorneys for plaintiff, he permitted plaintiff to proceed with testimony in support of the return of service. The deputy bailiff who made the return testified he had no recollection of the service and when asked by the court what the book showed, testified that this was in vacation time and he could not find the return of the service in any of the books. The return endorsed on the summons showed that he served Irene Sigman at 2711 North Nordica avenue, Chicago, and at the same time served Edward H. Sigman by



serving her. Irene Sigman testified that she had never lived at 2711 North Nordica avenue, that she was not there on July 14, 1955, the date of service, and that she had never met the deputy who made the return. She was supported in this by Edward H. Sigman and Chester J. Michaels, the Sigman's son-in-law, who testified that he and his wife lived at 2711 North Nordica avenue but no one was living in the house in July 1955 as they were then in McHenry, Illinois.

While it is true that there is a presumption in favor of the return of service even though the deputy has no independent recollection of having made the service, such presumption is overcome in the instant case by the testimony of three witnesses who deny not alone actual service but that this was defendants' place of abode.

We have examined the cases cited by plaintiff on this point, and the distinction between them and the instant case is clear. In Marnick v. Cusack, 317 Ill. 362, and Smith v. Zuta, 247 Ill. App. 203, the returns were challenged by the uncorroborated testimony of the persons on whom process had been served. In Hatmaker v. Hatmaker, 337 Ill. App. 175, the deputy sheriff was locked out by the defendant. He then placed the summons underneath the door after telling the defendant that was what he intended to do. This was held to be personal service. In Anchor Finance Corp. v. Miller, 8 Ill. App.2d 326, a sister who spent considerable time in the defendant's apartment and who lived in an adjoining apartment was held to be a member of the family for the



purpose of service.

It is urged upon us that the court heard the witnesses and that his finding should not be disturbed. The issue rested entirely on a presumption in favor of the bare return as against the testimony of three witnesses. The testimony of these witnesses was sufficient to overcome the presumption. Moreover, the trial court assumed there was no valid service and decided the case not upon the question of service but upon the ground that no meritorious defense was stated. This is the next issue we will consider.

The court from his statement seems to have assumed that defendants were relying upon rescission. However, defendants are not relying upon rescission but upon Section 69 (1)(a) of the Uniform Sales Act (Ch. 121-1/2, Par. 69 (1)(a) Ill. Rev. Stat. 1955) as follows:

"Where there is a breach of warranty by the seller, the buyer may, at his election -

"(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price."

The averments of the petition setting forth a meritorious defense have not been denied nor was any hearing had thereon and therefore must be taken as admitted. Zandstra v. Zandstra, 226 Ill. App. 293, 298; Lichter v. Scher, 4 Ill. App.2d 37; Lane v. Bohlig, 349 Ill. App. 487. The petition alleges that defendants, having no special knowledge of the technical operation of oil burners, apprised plaintiff of their unfamiliarity therewith and relied upon plaintiff's



representations and proposals that it would sell them a workable oil burner with automatic controls and would install the same in a competent workmanlike manner; that prior to installation of the burner plaintiff made a full and complete investigation and inspection of the heating plant, and then follow averments with respect to the subsequent inadequacy and failure of the oil burner, and that frequent demands were made upon plaintiff to remedy the defects, which plaintiff refused to do.

These allegations are sufficient to sustain an implied warranty of fitness for the purpose for which the goods were intended. Automatic Oil Heating Co. v. Lee, 296 Ill. App. 628. The buyer had the right to keep the burner and recoup in diminution or extinction of the purchase price. In distinguishing these cases plaintiff says that the defendants therein presented evidence of their allegations to the trial court. It is expected that upon the remandment of this case if plaintiff takes issue with the statement of fact set forth in the petition the trial court will give it a hearing thereon.

The only other point which we deem it necessary to consider here is the claim that defendants have not been diligent. Judgment was entered July 26, 1955 and defendants came into court October 14, 1955. In Lichter v. Scher, 4 Ill. App.2d 37, judgment was entered December 13, 1951 and it was not until September 16, 1953 that defendant filed a petition to vacate. In that case we





said, p. 42:

"In all those cases in which relief has been denied because of a lack of diligence, service had been had on the defendant and the default related to a failure to file a pleading, to appear for trial, or in some other respect occurring after the court had acquired jurisdiction by service. To miss this distinction is to lose sight of the fact that a void judgment may be set aside at any time. Parker v. Macoy, 91 Ill. App. 313 (1900); Keeler v. People ex rel. Kern, 160 Ill. 179, 182 (1895); Ray v. Moll, 336 Ill. App. 360, 84 N.E.2d 163, 166 (1949). The rule that equity will not relieve one against the neglect of a party who has not made a proper defense or moved for a new trial presupposes that he knowingly had a day in court. Owens v. Ranstead, 22 Ill. 161, 162 (1859)."

The judgment should be vacated. Defendants, however, should not be dismissed out of the case but the matter should be heard on its merits. Lichter v. Scher, 4 Ill. App.2d 37, 43.

The order is reversed and the cause is remanded with directions to take such further proceedings as are not inconsistent with the conclusions herein expressed.

Order reversed and cause  
remanded with directions.

Robson, P. J., and McCormick, JJ., concur.



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A

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
October Term, A. D. 1956

Term No. 56-0-3

Agenda No. 3

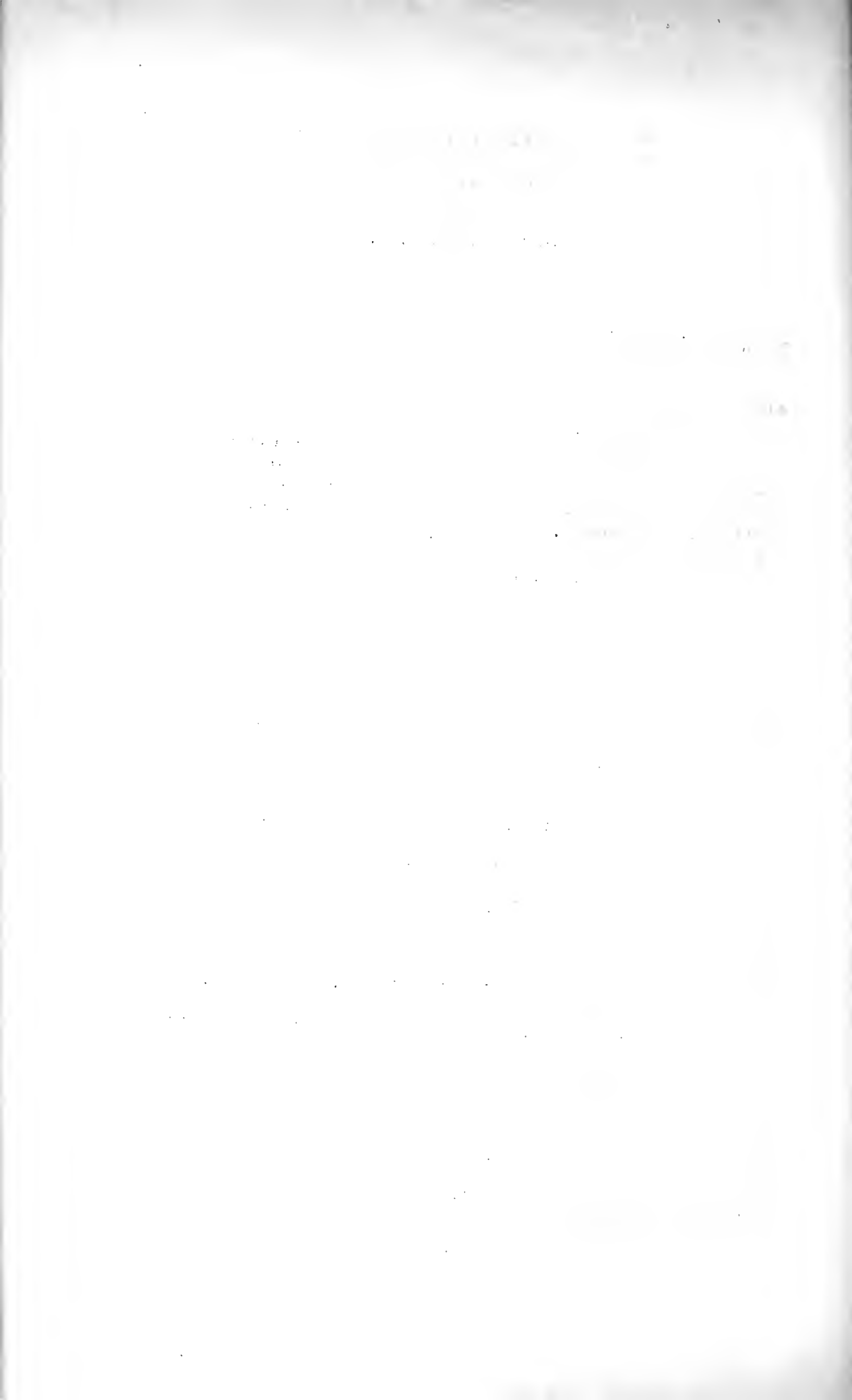
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|--------------------------------|---|------------------|
| WILLIAM SPIKER,                | ) |                  |
|                                | ) |                  |
| Plaintiff-Appellee,            | ) |                  |
|                                | ) |                  |
| vs.                            | ) | Appeal from the  |
|                                | ) | City Court of    |
|                                | ) | Alton, Madison   |
| LESLIE CHRISTESON, d/b/a HAM ) | ) | County, Illinois |
| & MERV TAXI CO.,               | ) |                  |
|                                | ) |                  |
| Defendant-Appellant.           | ) |                  |

12 T.A. 557

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CULBERTSON, J.  
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This case is before us on appeal from the City Court of Alton, Madison County, Illinois, on a judgment entered pursuant to the verdict of a jury in the sum of \$2,000.00 in favor of Plaintiff, WILLIAM SPIKER, and as against defendant, LESLIE CHRISTESON, d/b/a HAM & MERV TAXI CO.

It is contended on appeal in this Court by the defendant that the verdict of the jury was against the manifest weight of the evidence and that the Court should, accordingly, have allowed a motion for judgment notwithstanding the verdict or in the alterna-



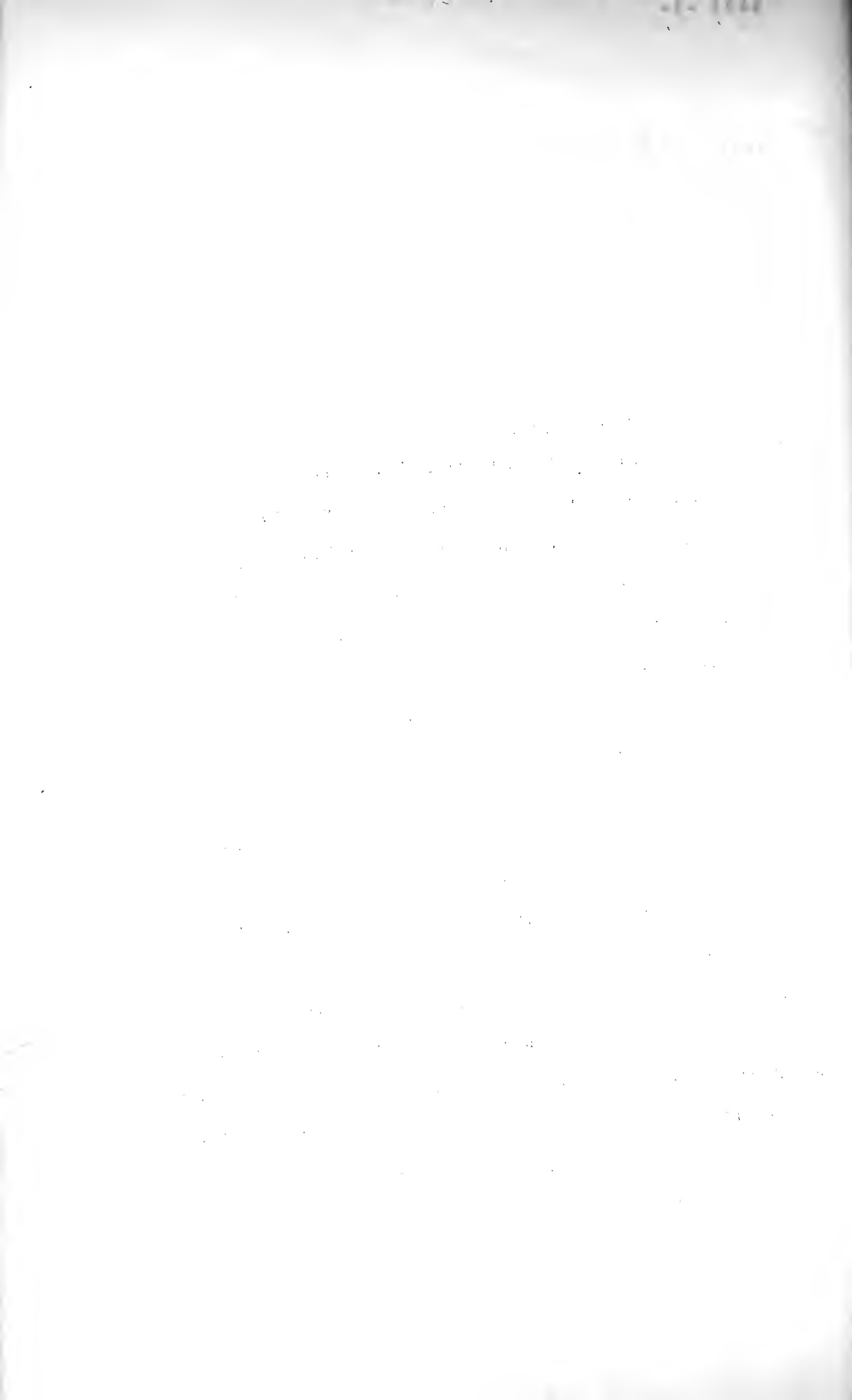
tive that the Court should have granted the motion for a new trial, principally for the reason that a juror who stated on his voir dire examination that he had no prejudice against defendant's counsel, in a subsequent case volunteered on examination, in that case, that he was prejudiced as against one of the attorneys who participated in this case on behalf of the defendant.

The action was instituted to recover for damages sustained in an automobile accident involving an automobile driven and occupied by plaintiff and a taxicab owned by defendant. The accident occurred at the intersection of Broadway with Herbert Street in Alton, Illinois. There were no traffic lights or signals at this intersection. About 125 to 150 feet away at another intersection of a street called Chessen Lane with Broadway there were traffic lights which controlled only the Chessen Lane-Broadway intersection. The taxicab of defendant attempted to make a left turn from Broadway onto Herbert Street. The plaintiff testified that the light at the Chessen Lane-Broadway intersection changed from green to caution as he was passing through it and that he then proceeded on in a westerly direction and as he approached the Herbert street intersection the taxicab crossed from the south half of the highway into the path of his automobile. It is the contention of defendant



that since the testimony of a number of witnesses on behalf of the defendant contradicted that of plaintiff, a verdict based principally on plaintiff's testimony could not be sustained.

There was conflicting evidence in the case and it was for the jury to weigh the evidence and determine the credibility of the witnesses who testified (MUETH vs. JASKA, 302 Ill. App. 289, 294; CARNEY vs. SHEEDY, 295 Ill. 78, 83), and a verdict based upon conflicting evidence approved by the Trial Judge will not be disturbed on appeal (CARNEY vs. SHEEDY, supra), unless such verdict is clearly contrary to the manifest weight of the evidence. The testimony of witnesses for the defendant as to whether or not the light was red or green at the intersection of Chesson Lane and Broadway, under the facts in the case, would not be controlling, and it was within the province of the jury to determine whether or not plaintiff was guilty of contributory negligence and whether or not defendant was guilty of negligence so as to justify a recovery by plaintiff. Under the facts in the record before us we cannot say, as a matter of law, that plaintiff was not entitled to recover, and the verdict of the jury will not be set aside in view of the conflicting evidence and the fact that the verdict is supported by evidence, which, if believed by the jury, would justify the verdict returned.





The only other issue before us on appeal which merits attention involves a statement by one of the attorneys for defendant, in an affidavit filed after verdict, which did not state or specify when the prejudice arose, it was asserted that a juror in this case was prejudiced as against such attorney during the trial of this particular case. The affidavit attached set forth that the juror volunteered information that he was prejudiced as against such attorney at a later date and in the trial of an entirely different case, not involving either of the parties to this suit. There was no showing as to the nature of the prejudice or when or how it arose, and conceivably, it could have arisen after the verdict in the instant case. Affidavits or statements of jurors ordinarily cannot be considered to impeach their verdict (LAUCKS vs. PIERCE, 341 Ill. App. 253). There is nothing in the record to show the juror answered untruthfully in his voir dire examination in this case, or that there was any existing prejudice in this case as against the attorney during the progress of the case. The verdict of the jury will, therefore, not be disturbed on the basis of the affidavit filed in this case as to statements of a juror relating to a subsequent prejudice as against one of the attorneys for the defendant.

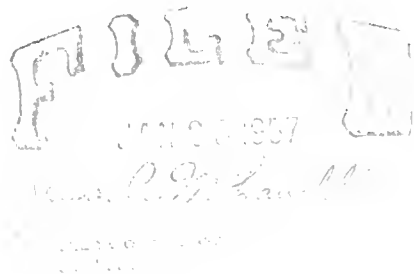


There being no reversible error in the record in this case the judgment of the City Court of Alton, Madison County, Illinois, will be affirmed.

Judgment affirmed.

Scheineman, P.J., and Bardens, J., concur.

Publish abstract only.



1. The first part of the report is devoted to a general

description of the area and the results of the

investigation. The second part is devoted to a

description of the

results of the investigation.

The third part is devoted to a

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*Court entered  
its decision  
in April 1937  
of 10 pages  
per letter  
2/28/57*

A

APPELLATE COURT  
STATE OF ILLINOIS  
FOURTH DISTRICT

October Term, A. D. 1936

Term No. 56-0-10.

Agenda No. 6 .

SHELBY HALEY,

Plaintiff-Appellee,

Vs.

VINA WIGGS,

Defendant-Appellant,

and

WALLACE NICK,

Defendant,

WALLACE NICK,

Counterclaimant,

Vs.

SHELBY HALEY,

Counterdefendant-Appellee.)

12 1A 558

Appeal from the  
Circuit Court of  
Franklin County,  
Illinois.

BARDENS, J.

This law suit filed in the Circuit Court of Franklin County arises out of an accident on Route 14, west of Benton, Illinois, involving three automobiles. Plaintiff dismissed his suit against defendant Nick and proceeded to trial against defendant Wiggs, recovering a jury verdict. All of defendant's post trial motions were denied and judgment was entered on the verdict. On appeal, defendant contends she was not guilty of negligence as a matter of law and that plaintiff was contributorily negligent as a matter of law; that dismissal of the suit against the co-defendant Nick released defendant; and that a new trial should be granted because the verdict is against the manifest weight of the evidence and because of alleged errors occurring in the course of the trial.

1703



Between 8:00 and 9:00 A.M. on a rainy morning, as defendant Wiggs drove west on Route 14 between Lenton and Christopher on her way to work, she encountered a dense fog bank contributed to by the brickette plant and coal mine refuse pile near the highway at the village of Buckner. Co-defendant Kick was following the Wiggs' car and observed her go into the fog bank. He slowed his car but continued into the fog blanket for about 150 feet when he suddenly came upon and struck the rear of the Wiggs' car which he thought was stopped. Defendant Wiggs testified that she was moving slowly, driving with her head out of the window when struck. Both cars stopped on the highway and defendants got out to ascertain the damage to property and to inquire as to personal injury. Within 30 or 40 seconds, a car was heard approaching, and as defendants ran to the shoulder, plaintiff's car struck defendant Kick's car causing substantial personal injury to plaintiff and property damage. Defendant Wiggs testified that she did not know whether her car would run after the first impact but did observe that the damage was comparatively slight.

~~X~~ The evidence is highly conflictin as to certain details of the accident such as rates of speed, the question of whether or not the defendant was stopped or merely had slowed down, and the feasibility of the defendants taking to the shoulder of the highway rather than remaining upon the slab. It is clear to us, however, that there is sufficient evidence supporting plaintiff's theory of the case that required its submission to the jury and sufficient conflict in the





evidence that the decision depended upon credibility and that the verdict was not against the manifest weight. The trial court, therefore properly denied defendant's various motions based upon weight of evidence.

~~2~~ The contention of the defendant most strenuously argued is that she was released from liability by dismissal of the suit against her co-defendant. This dismissal order was entered on the first day of trial and disposed of plaintiff's claim and co-defendant Nick's counterclaim "with prejudice." However, it appears that it was drafted by defendant Nick's counsel and that the words "with prejudice" were used through inadvertence; that plaintiff and co-defendant agreed that the joint dismissal was in the nature of mutual covenants not to sue, for which no monetary consideration was given. The order was entered on October 6, 1955. Subsequently, various motions, counter motions and answers concerning the correction of this order were filed and argued by the parties. On February 16, 1956, the trial judge, after hearing, entered an order striking the words "with prejudice" from the original order of dismissal of October 6. This action by the trial court was taken to conform the order to the clear intention of the parties directly involved and though it transpired more than 30 days after entry of the original order was within the discretionary power given trial courts under Section 72 of the Civil Practice Act, Ill. Rev. Stat., 1953, Chap. 110, Par. 196. The motion filed on December 6, 1955, asking the Court to correct the order of



October 6 was supported by affidavits of counsel for the plaintiff and also counsel for the defendant Mick and clearly set up facts which were not known to the Court at the time of entering the October 6th order.

~~134~~ We next turn to appellant's contention that the Court erred in denying its motion for a new trial because of various prejudicial occurrences during the trial. The incidents are primarily concerned with opposing counsel's use of leading questions, comments and argument in the presence of the jury in response to objection and prejudicial comment in the course of final argument. We have carefully read the abstracted transcript of testimony in the record and note many instances of incomplete transcription of the proceedings because of the confusion, noise, or both attorneys talking at the same time. This condition should not have been permitted by the trial judge; nor should the court reporter have hesitated to notify the trial judge that she was unable to obtain a complete transcript of the proceedings because of such confusion. We agree that the record reveals the persistent use of improper leading questions by plaintiff's counsel even after objection by appellant and cautionary comment by the trial judge. The main source of the difficulty, however, arose from use of a stenographer's transcript of prior proceedings before a justice of the peace as attempted impeachment, or admissions against interest, in the course of cross examination. Many of the questions and answers used by counsel were completely consistent with testimony given at the trial in progress and were properly



objected to. From page 143 of the record we note such an objection by plaintiff's counsel followed by improper comment in the following colloquy:

"Mr. Troubaugh: I object. That is what he said here.

Court: The jury will know what he said. He stated this is preliminary.

Mr. Trobaugh: I object, he can't insinuate to this jury something that is not true. I loaned Bob this transcript, I put my cards on the table.

Court: I resent that proper respect has not been shown to this Court, and I wish you would proceed like lawyers."

On page 160 of the record, the following report of proceedings appears:

"Reporter's Note: At this time the attorneys have some discussion and I was unable to get the objection.

Mr. Hill: I want to object to Mr. Troubaugh's statement. I object to his making comments.

Mr. Troubaugh: If she would answer the questions and didn't make a big speech.

A. I am trying to answer the questions.

Q. You answered the question, we don't want a big speech.

Mr. Hill: I would like for the record to show that counsel for the defendant, Vina Wiggs, objects to the comments of Mr. Troubaugh—<sup>em</sup>(Again both attorneys talking at the same time.)

Mr. Troubaugh: I set here while Mr. Hill asked questions, leading questions, and I consulted the Court and asked if I had to listen to that, and the Court asked me to put up with it and I did, and now every question I've asked he's been on his feet objecting.



"Mr. Hill: I respectfully object to the comment of Mr. Trobaugh, it is not in order. He could have objected to any examination I made if he felt it was not well taken, he could have objected at any time. At this time on behalf of Defendant, Vina Wiggs, we respectfully move the Court to declare a mistrial and ask leave to file a motion to that effect. (At this time the Court and attorneys have a conference out of the presence of the jury.) Jury back in box and Court over-rules the motion to withdraw the jurors."

That such conduct pervaded the entire proceedings may be gathered from the following remark of the trial judge toward the end of the trial, as reported at page 172 of the record:

"Gentlemen, we have reached the point in this case if you continue like this I am giving you fair warning, if this continues I will withdraw the Jurors and call a mistrial."

~~13~~ We are well aware of the fact that the trial judge is in the best position to determine to what extent improper comments of counsel were heard by the jury or influenced the outcome of the case. However, when it appears from the whole record that the proceedings in the trial court were conducted in an atmosphere not conducive to a fair appraisal by the jury of the contentions of the parties, this Court will not hesitate to order a new trial. We conclude that such condition existed in the trial of this case and that remarks of plaintiff's counsel were prejudicial. In addition to the foregoing, we observe that on final argument, plaintiff's counsel advised the jury as follows:





"He has not come in here and asked for twenty, thirty or forty thousand but an amount fixed he can get, can collect, \$10,000.00 that is what he is suing for and that is a pitiful sum for the injuries he has received."

The emphasis on collectibility of the specific figure rather than compensation for physical injury is suggestive of insurance, though it might not have been so interred, and is logically indefensible because not a pertinent issue for the jury.

This court concludes that the defendant has not had the fair and impartial trial secured to her by law. The case must therefore be reversed and remanded for a new trial.

|| Reversed and remanded.

Scheineman, P. J., and Culbertson, J., Concurr.

~~Published in Full~~

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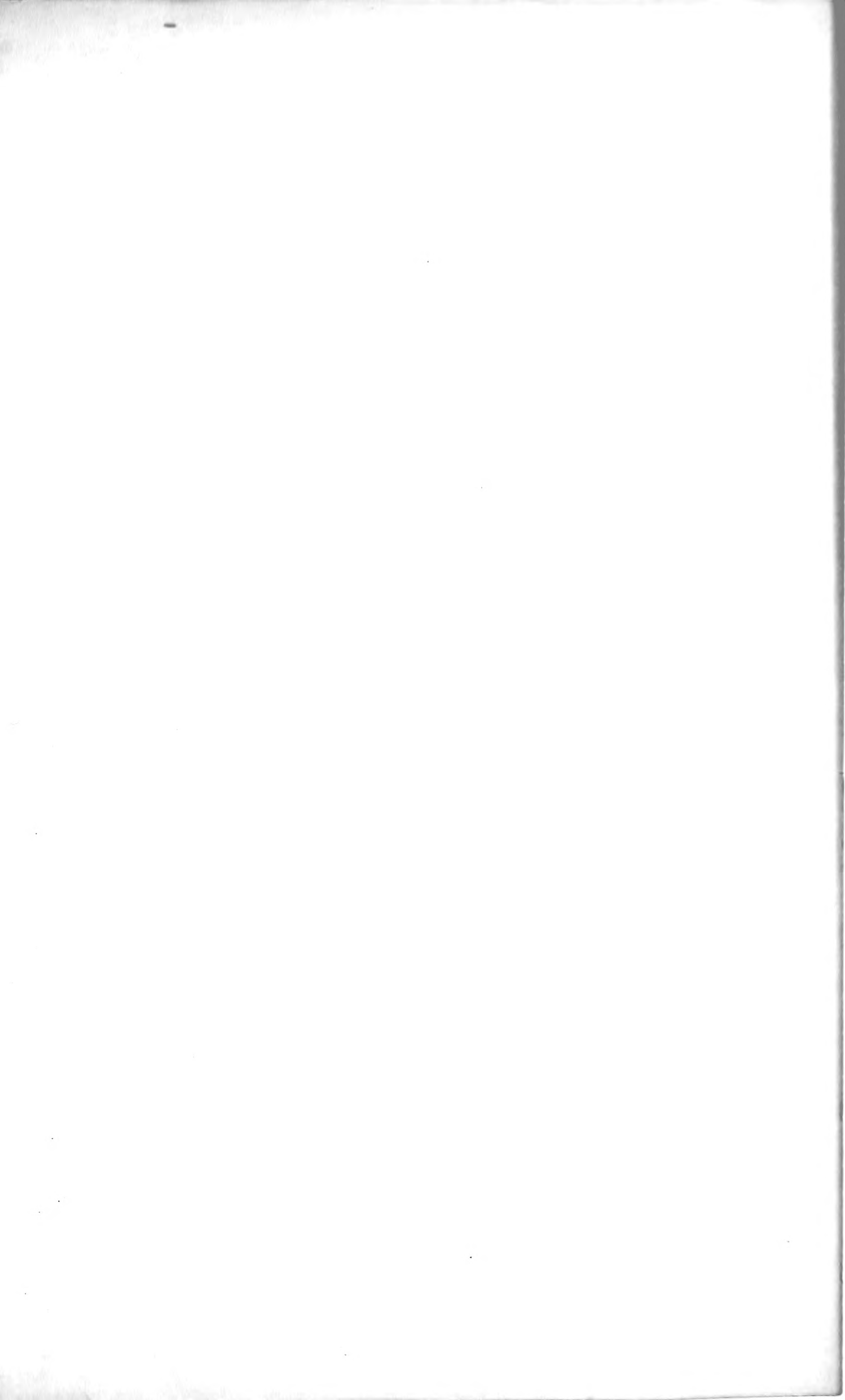
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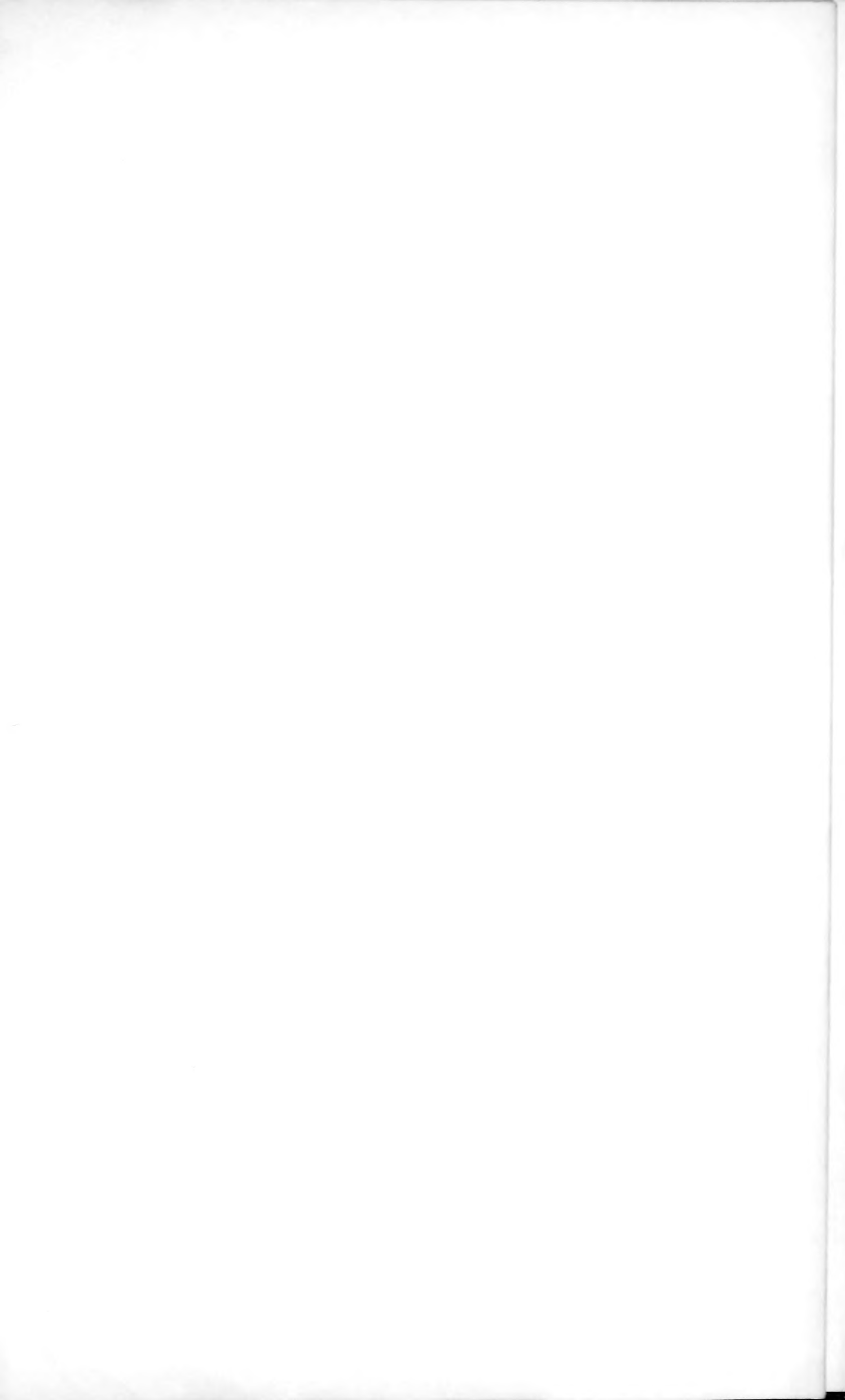
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| 4-22-73 | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |
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| 6-26-74 | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |
| 2/27/75 | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |
| 4-16    | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |
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| 2/1/75  | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |
| 8/17    | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |
| 5/13/77 | <del>R. R. R. R.</del> | <del>10-28648</del> | <del>10-28648</del> |

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